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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 178.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

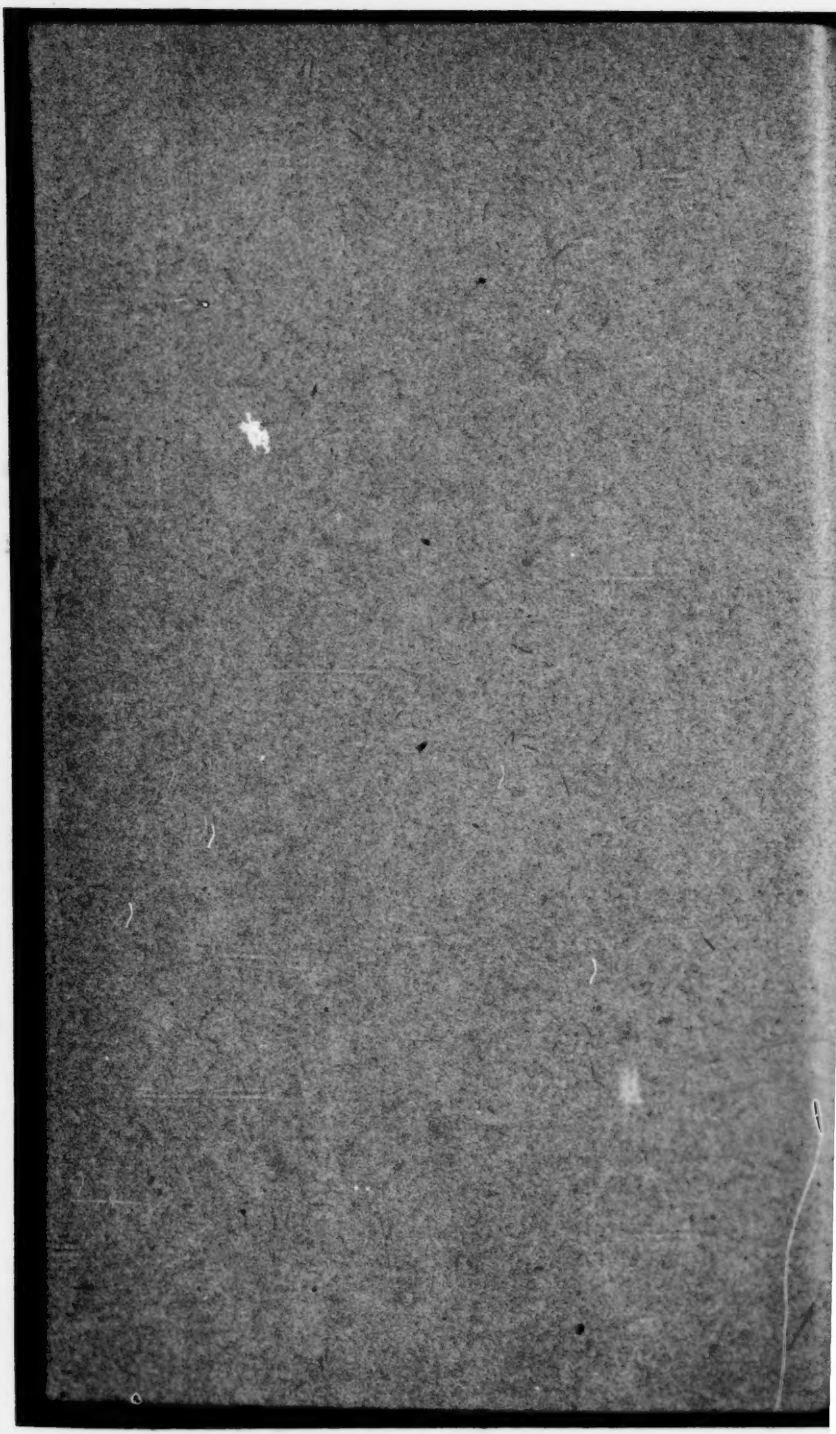
vs.

THE STATE OF NEBRASKA EX REL. THE CITY OF OMAHA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MAY 16, 1902.

(16,300.)



(16,300.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 524.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA EX REL. THE CITY OF OMAHA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 CHICAGO, B. & Q. R. Co. } No. 7805.
v.
STATE *ex Rel.* OMAHA. }

Pleas before the supreme court of the State of Nebraska at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 7 day of January, 1896.

Present: Hon. A. M. Post, chief justice; Hon. T. O. C. Harrison, Hon. T. L. Norval, judges.

Attest: D. A. CAMPBELL, *Clerk.*

Be it remembered that on the 12 day of June, 1895, there was filed in the office of the clerk of said court a certain petition in words and figures following, to wit:

In the Supreme Court of Nebraska.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, Plaintiff in Error,
v.
THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator, Defendant in Error. } Petition in Error.

Comes now The Chicago, Burlington & Quincy Railroad Company, plaintiff in error herein, and, complaining of the defendant in error, alleges that on May 1, 1895, in an action pending in the district court of Douglas county, Nebraska, wherein the above-named defendant in error was relator and the plaintiff in error herein was respondent, a judgment was rendered in favor of the relator and against the respondent, ordering and allowing a peremptory writ of mandamus to issue against the respondent, the plaintiff in error herein, commanding it to do and perform
2 certain things therein specified and adjudging the costs of said action against it. A duly certified transcript of said proceedings, including said judgment, together with a duly authenticated bill of the exceptions upon the trial of said cause, is filed herewith.

The plaintiff in error alleges that there is error appearing of record in said proceedings and judgment in said cause as follows:

1. The court erred in rendering its judgment herein for the reason that same is not sustained by sufficient evidence.

2. The court erred in rendering its judgment herein for the reason that same is contrary to law.

3. The court erred in rendering its judgment herein because the relator, defendant in error, had no power or authority to require or compel the respondent, plaintiff in error, to repair the Eleventh-street viaduct.

4. The court erred in holding that relator had any power conferred on it by virtue of chapter twelve of the Compiled Statutes of

Nebraska, 1893, to require respondent to repair the Eleventh-street viaduct or any part thereof.

5. The court erred in holding that the provisions of section 48 of the charter creating cities of the metropolitan class, as amended in 1893, did not impair the obligations arising out of the contract between this respondent and the relator relative to the construction of the Eleventh-street viaduct.

6. The court erred in holding that the relator, under the terms of the contract of 1886 between the relator and this respondent and the laws then subsisting relative thereto and subsequent amendments, was not bound to repair the Eleventh-street viaduct.

7. The court erred in not holding section 48 of an act entitled "An act incorporating metropolitan cities," etc., as amended in 1893, unconstitutional.

3 8. The court erred in failing and refusing to determine and adjudicate the issues made by the pleadings in this case.

9. The court erred in holding that the charter of the predecessor of this respondent and an ordinance, No. 729, of the relator did not constitute a contract between this respondent within the meaning and protection of the constitution of Nebraska and the United States, guaranteeing the inviolability of contracts.

10. The court erred in holding that section 48 of the charter relating to metropolitan cities, as amended in 1893, had any reference to viaducts theretofore constructed.

11. The court erred in exercising jurisdiction herein for the reason that there was a defect of parties respondent.

12. The court erred in holding that relator had any authority conferred on it by section 48 of the charter relating to metropolitan cities, and as amended in 1893, to determine upon and select the materials for the repair of the vaiduct in controversy.

13. The court erred in compelling this respondent to arbitrarily repair one-third of the viaduct in controversy, when, as a matter of fact, this respondent only owned and operated a single track out of twenty-one or more tracks which crossed Eleventh street under said viaduct, that requirement being arbitrary, unjust, inequitable, unreasonable, and unconstitutional.

14. The court erred in granting the writ herein for the reason that an obedience to the commands of the same by this respondent would not repair the viaduct in controversy.

15. The court erred in granting the writ herein for the reason that the Union Pacific Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Milwaukee &

4 St. Paul Railway Company, which own and operate, either jointly or severally, twenty or more of the tracks which cross said Eleventh street beneath said viaduct, are necessary parties in order to determine the proportion each should bear, including this respondent, in the cost of or the repair of the viaduct in controversy.

16. The court erred in not deciding that the ap-portionment of one-third of cost of repairing viaduct to this respondent was inequitable, unjust, and arbitrary, and, further, in not deciding that the action

of the city council in making such apportionment was subject to review in this proceeding.

17. The court erred in overruling the motion for a new trial herein for the reason that the decision is not sustained by sufficient evidence.

18. The court erred in overruling the motion for a new trial herein because the decision is contrary to law.

19. The court erred in overruling the motion for a new trial herein because the court failed and refused to determine and adjudicate the issues made by the pleadings in this cause, particularly in refusing to decide whether or not the apportionment to this respondent, the plaintiff in error herein, of one-third of the cost of repairing the Eleventh-street viaduct was inequitable, unjust, and arbitrary and in not deciding whether or not the action of the city council in making such apportionment was subject to review in this proceeding.

Wherefore the plaintiff in error prays that the judgment aforesaid be reversed, and that same be remanded, and for such other relief in the premises as to the court shall seem just and proper.

5 CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
By GREEN & BRECKINRIDGE, *Its Attorneys.*

(Endorsed:) 7805. In supreme court, State of Nebraska. The Chicago, Burlington and Quincy Railroad Company, plaintiff in error, *v.* The State of Nebraska *ex rel.* The City of Omaha, relator, defendant in error. Petition in error. Supreme court of Nebraska. Filed Jun- 12, 1895. D. A. Campbell, clerk.

And on the same day, to wit, the 12 day of June, 1895, there was filed in the office of the clerk of said court a certain defendant's appearance in words and figures following, to wit:

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, Plaintiff in Error, *vs.* THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator, Defendant in Error.	Waiver of Summons and Appearance of Defendant in Error.

Now comes the defendant in error, The State of Nebraska *ex rel.* The City of Omaha, and waives the issuance of summons in error herein and enters its appearance herein.

Omaha, June 11th, A. D. 1895.

W. J. CONNELL,
Attorney for Defendant in Error.

(Endorsed:) 7805. In supreme court, State of Nebraska. The Chicago, Burlington and Quincy Railroad Company *v.* The State of Nebraska *ex rel.* The City of Omaha, relator. Waiver of summons and appearance of defendant in error. Supreme court of Nebraska. Filed Jun- 12, 1895. D. A. Campbell, clerk.

6 And on the same day, to wit, the 12 day of June, 1895, there was filed in the office of the clerk of said court a certain motion in words and figures following, to wit:

In Supreme Court, State of Nebraska.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error, *vs.* STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Defendant in Error.	Motion to Advance Hearing of Cause.

And now comes the said defendant in error and represents that said cause involves a question of great public interest and concern affecting the city of Omaha and the inhabitants of said city, and that it is very important and necessary to have an early hearing and determination of said cause.

The said defendant in error therefore moves the court that the hearing of said cause be advanced and that said cause be heard at an early day to be fixed by the court.

THE STATE OF NEBRASKA EX REL. THE CITY OF OMAHA, *Defendant in Error*,
By W. J. CONNELL, *City Attorney*.

(Endorsed:) 7805. In the supreme court, State of Nebraska. Chicago, Burlington & Quincy Railroad Co., plaintiff in error, *vs.* The State of Nebraska *ex rel.* The City of Omaha, defendant in error. Motion to advance hearing of cause. Supreme court of Nebraska. Filed Jun- 12, 1895. D. A. Campbell, clerk.

7 And on the same day, to wit, the 12 day of June, 1895, there was filed in the office of the clerk of said court a certain transcript in words and figures following, to wit:

Doc. forty-eight, No. 349.

Pleas before the Honorable G. W. Ambrose, one of the judges and the presiding judge of the district court of the fourth judicial district of the State of Nebraska, at a term thereof within and for the county of Douglas begun and held at the city of Omaha on the 4th day of February, A. D. 1895.

Be it remembered that heretofore, to wit, on the 19th day of January, A. D. 1895, The State of Nebraska *ex rel.* The City of Omaha, relator, by J. W. Connell, its attorney, filed in the office of the clerk of said court its petition and application for mandamus against The Chicago, Burlington & Quincy Railroad Company, respondents; which said petition and application reads and is in the words and figures following, to wit:

Petition & Application for Mandamus.

In the District Court of Douglas County, State of Nebraska.

THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator, *vs.* THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.	Petition and Application for Mandamus.

To the honorable the court above named:

Your petitioner, The City of Omaha, respectfully represents and shows to your honors that the city of Omaha, in the county of Douglas and State of Nebraska, is a city of the metropolitan class duly existing under and governed by the provisions of chapter 12*a*—cities of the metropolitan class—of the Compiled Statutes of Nebraska of 1893, purporting to be published under the au-
8 thority of the legislature by Guy A. Brown and Hiland H. Wheeler, and is possessed of all the rights, powers, and privileges provided for or authorized by the several provisions of said chapter of said statutes.

Your petitioner further represents and shows unto your honors that — all the times and dates herein mentioned or referred to the said Chicago, Burlington & Quincy Railroad Company was and now is a corporation duly created and existing under and by virtue of the laws of the State of Illinois and has complied with the laws of the State of Nebraska so as to be authorized to transact and do business as a railroad company in the State of Nebraska and has a general office for said State of Nebraska in said State and is the grantee and successor to the Missouri River Railroad in Nebraska and the Omaha & Southwestern Railroad Company, which said last-named companies are corporations duly created under the laws of the State of Nebraska.

Your petitioner further represents and shows unto your honors that said Chicago, Burlington & Quincy Railroad Company, as such grantee and successor of said Missouri River Railroad in Nebraska and said Omaha & Southwestern Railroad Company, at all the times and dates herein mentioned or referred to was and is the owner of and was and is engaged in operating a number of railroad lines in said State of Nebraska with railroad tracks starting from its railroad passenger and freight station in the city of Omaha, east of Tenth street, in said city, and extending westward through said city over and across Eleventh street, in said city, which said Eleventh street your petitioner represents and alleges to be a public street in the city of Omaha and a much-travelled thoroughfare, which for many years past has existed from Chicago street, in the northerly portion of the city, southward for a distance of about thirty blocks to a certain street known as Bancroft street.

9 Your petitioner further represents and shows unto your honors that there now is and at the time of the proceedings

hereinafter referred to there was a certain iron viaduct with plank flooring along said Eleventh street, extending from Jackson street to Mason street, a distance of four blocks, in said city, and extending over and across all of the tracks of said railroad corporations hereinbefore named, all of which are daily and constantly used and operated by said Chicago, Burlington & Quincy Railroad Company.

Your petitioner further represents and shows unto your honors that by reason of said railroad tracks of said Chicago, Burlington & Quincy Railroad Company crossing said Eleventh street, which was a generally traveled and much frequented street by teams and pedestrians, which tracks so cross said Eleventh street at a grade or ground crossing under the southern portion or part of said viaduct as constructed, and by reason of certain railroad tracks of the Union Pacific Railway Company of like character over and along that portion of said Eleventh street now under the northerly portion of said viaduct, the said Eleventh street was rendered dangerous for travel by teams and pedestrians, and it became necessary for the safety and protection of the public to construct said viaduct, and it was therefore declared necessary for the safety and protection of the public, by ordinance duly passed by the mayor and council of said city, to construct said viaduct, and the said viaduct, after the passage of said ordinance and other proceedings duly had and taken in that behalf, was constructed by said Chicago, Burlington & Quincy Railroad Company and the said Union Pacific Railway Company, and was completed by said companies about the year 1886 or 1887.

10 Your petitioner further represents and shows unto your honors that subsequently, about the year 1892, the said viaduct became out of repair and dangerous to public travel, and by reason thereof, on or about the 21st day of July, 1892, a concurrent resolution was duly passed by the city council and approved by the mayor of said city, requiring the committee on viaducts and railways of said council and the city engineer of said city to examine the roadway and road-bed of said Eleventh-street viaduct and report to the city council if it was necessary to repave said viaduct, a copy of which said resolution is hereto attached, marked "Exhibit A;" that in pursuance of said resolution, on the 23rd day of August, 1892, the said committee on viaducts and railways reported to the said city council that said viaduct, as your petitioner alleges the fact to be, was in a dangerous and shameful condition; that there was scarcely a yard of pavement thereon that was not full of holes, and, in fact, nearly the entire pavement had rotted away, and that the walk for foot passengers was dangerous, and that said viaduct was otherwise out of repair, a copy of which said report is hereto attached and referred to as a part of this petition and is marked "Exhibit B."

Your petitioner further represents and shows unto your honors that the city engineer of said city also reported that said viaduct was dangerous and should be repaired, which report was referred to said committee on viaducts and railways, and said committee

subsequently, to wit, September 2, 1892, reported thereon, as shown by a copy of the report of said committee dated September 2, 1892, hereto attached and referred to as a part of this petition and is marked "Exhibit C."

11 Your petitioner further represents and shows unto your honors that in consequence of the dangerous condition of said viaduct for public travel and the need of making repairs to said viaduct it was closed to public travel, and that no teams or pedestrians for about two years last past have been allowed to cross over said viaduct, to the great injury, annoyance, and detriment of the public.

Your petitioner further represents and shows unto your honors that on or about December 4, 1893, ordinance No. 3734 was duly passed by the city council of said city of Omaha and duly approved December 12, 1893, by the mayor of said city, declaring the necessity of repairing said Eleventh-street viaduct and directing the board of public works to prepare plans and specifications for the repairing of said viaduct, a copy of which said ordinance is hereto attached and referred to as a part of this petition and is marked "Exhibit D."

Your petitioner further represents and shows unto your honors that thereafter, in pursuance of the provisions of said ordinance No. 3734, the said board of public works and the city engineer duly submitted plans and specifications for the repair of said Eleventh-street viaduct to the mayor and city council of said city, a copy of which said plans and specifications are hereto attached, marked "Exhibit E," and referred to as a part of this petition, and which said plans and specifications were duly approved by the mayor and city council by the provisions of ordinance No. 3752, duly passed by said city council January 30, 1894, and duly approved by the mayor of said city February 2, 1894, a copy of which said ordinance No. 3752 is hereto attached and referred to as a part of this petition and is marked "Exhibit F."

12 Your petitioner further represents and shows unto your honors that under and in pursuance of the provisions of said ordinance the city clerk of said city, in said month of February, 1894, after the approval of said ordinance last mentioned, furnished to said Chicago, Burlington & Quincy Railroad Company, and also to the said Union Pacific Railway Company, copies of said plans and specifications and duly certified copies of said ordinances and of the proceedings had and taken with reference to the repairing of said viaduct.

Your petitioner further represents and shows unto your honors that in the months of February and March, 1894, and frequently thereafter, by its proper officers, duly authorized in that behalf, your petitioner has made frequent demand on said Chicago, Burlington & Quincy Railroad Company to make repairs to said viaduct as required by said ordinances and as shown by said plans and specifications, but that said Chicago, Burlington & Quincy Railroad Company, by its officers, including its general manager for the State of Nebraska, George W. Holdrege, has absolutely and un-

qualifiedly refused to make said repairs or to take any action whatever with reference to making said repairs, and has wholly failed and neglected in any manner to make said repairs or to take any action whatever with reference to making the same, and does still fail, neglect, and refuse to make the same.

Wherefore your petitioner prays your honors to order that a writ of mandamus in due form issue from this court, returnable at such time as may be determined by your honors, commanding and requiring the said Chicago, Burlington & Quincy Railroad Company to repair that portion of said Eleventh-street viaduct in the city of Omaha, Douglas county, State of Nebraska, commencing at the south end of said viaduct and extending northward a dis-
13 tance of one-third of the entire length of said viaduct, the said repairs to be made in accordance with the requirements of ordinance No. 3752, duly passed by the city council of said city January 30, 1894, and approved by the mayor of said city February 2, 1894, and in accordance with the plans and specifications prepared and submitted by the city engineer and board of public works of said city approved by the council of said city January 30, 1894, and approved by the mayor of said city February 2, 1894, the said repairs to be commenced and carried forward without unnecessary delay, or on failure so to do to show to this court, on the return day of said writ, why the same has not been done.

THE CITY OF OMAHA,
By W. J. CONNELL, *City Attorney.*

STATE OF NEBRASKA, } ss:
Douglas County, }

George P. Bemis, being first duly sworn, says that he is the mayor and chief executive officer of The City of Omaha, the relator named in the foregoing petition; that he has read said petition and knows the contents thereof, and that each and every allegation therein contained is true. GEORGE P. BEMIS.

Subscribed in my presence and sworn to before me this 18th day of January, A. D. 1895.

[SEAL.] JOHN Q. BURGNER,
Notary Public.

EXHIBIT A.

City of Omaha, council chamber.

Resolved by the city council of the city of Omaha, the mayor concurring:

14 That the com. on viaducts and railways and city engineer examine the roadway and road-bed of the 11th-street viaduct and report to this body if it is necessary to repave said viaduct.

Introduced by Councilman Peter E. Elsasser.

Passed July 21, 1892. E. P. DAVIS,
President of the Council.

Attest: JOHN GROVES, *City Clerk.*

Approved:

GEO. P. BEMIS, *Mayor.*

EXHIBIT B.

City of Omaha, council chamber.

OMAHA, NEB., *Aug.* 23, 1892.

Mr. President:

Your committee to which was referred a resolution instructing your committee to examine the roadway of the 11th-St. viaduct and report if it be necessary to repave said viaduct have carefully examined the same and beg to report as follows:

The roadway of said viaduct is in a dangerous and shameful condition. There is scarcely a yard of pavement that is not full of holes; in fact nearly the entire pavement is rotted away; but far more dangerous is the walk for foot passengers.

We find the walk to be composed of but one thickness of plank, and these planks are warped and rotted, and if not attended to at once may be the cause of a frightful accident at any time.

We find also that the fence separating the footway from the road is broken down in many places, in some cases pieces of the fence being entirely missing.

In its present condition the Eleventh-street viaduct is a disgrace to the city, and we recommend that steps be at once taken to put it in a safe and passable condition.

15

SOL PRINCE,
GEO. F. MUNRO,
Committee on Viaducts & Railways.

EXHIBIT D.

Ordinance No. 3734.

An ordinance declaring the necessity of repairing the viaduct on and along South Eleventh street over the railroad tracks from a point near Jackson street to a point near Mason street, in the city of Omaha, and directing the board of public works to prepare plans and specifications for the repairing of said viaduct, etc.

Whereas, that the Eleventh-street viaduct extending from a point near Jackson street to a point near Mason street is unsafe and is in a dangerous condition; and

Whereas it is necessary for the safety and protection of the public that said viaduct be repaired, therefore,

Be it ordained by the city council of the city of Omaha:

SECTION 1. That it is necessary and it is hereby deemed and declared necessary for the safety and protection of the public that the Eleventh-street viaduct extending along Eleventh street from a point near Jackson street to a point near Mason street in the city of Omaha be repaired by causing a new and substantial floor to be placed on and across said viaduct.

SECTION 2. For the purpose of determining the material to be

used in the repairing of said viaduct and the manner and construction thereof, the board of public works of the city of Omaha are hereby ordered and directed within one week from the passage of this ordinance to prepare the plans and specifications for said repairs and to submit the same to the mayor and city council for their consideration, action and approval, and the city engineer for the purpose of enabling the said board of public works to submit said
16 plans and specifications as herein required, is hereby ordered under the direction of the board of public works to render such service to said board in preparing plans, drawings, details and specifications for the repairing of said viaduct as may be necessary for said purpose and as may be required by said board of public works.

SECTION 3. That this ordinance take effect and be in force from and after its passage.

Passed December 4th, 1893.

JOHN GROVES, *City Clerk.*
WM. F. BECHEL,
President City Council.

Approved Dec. 12th, 1893.

GEO. P. BEMIS, *Mayor.*

For Exhibit E see plat immediately following:

(Here follows diagram marked p. 17.)

18 EXHIBIT F.

Ordinance No. 3752.

An ordinance approving the plans and specifications submitted by the board of public works for the repairing of the Eleventh-street viaduct over the railroad tracks and ordering the repairing of said viaduct to be done.

Whereas, it has been and hereby is deemed and declared necessary for the safety and protection of the public that the Eleventh-street viaduct be repaired as herein required; and

Whereas, it is right, proper and reasonable that the railroad companies owning or operating railway tracks across said Eleventh street should make said repairs to said viaduct; therefore

Be it ordained by the city council of the city of Omaha:

SECTION 1. That the plans and specifications submitted by the board of public works of the city of Omaha, December 15, 1893, for the repairs of the Eleventh-street viaduct over the railroad tracks upon and across Eleventh street from a point near Jackson street to a point near Mason street in the city of Omaha, as prepared by the city engineer of said city, be and the same are hereby approved and adopted.

SEC. 2. That the Union Pacific Railway Company be and is hereby ordered, directed and required to repair that portion of said

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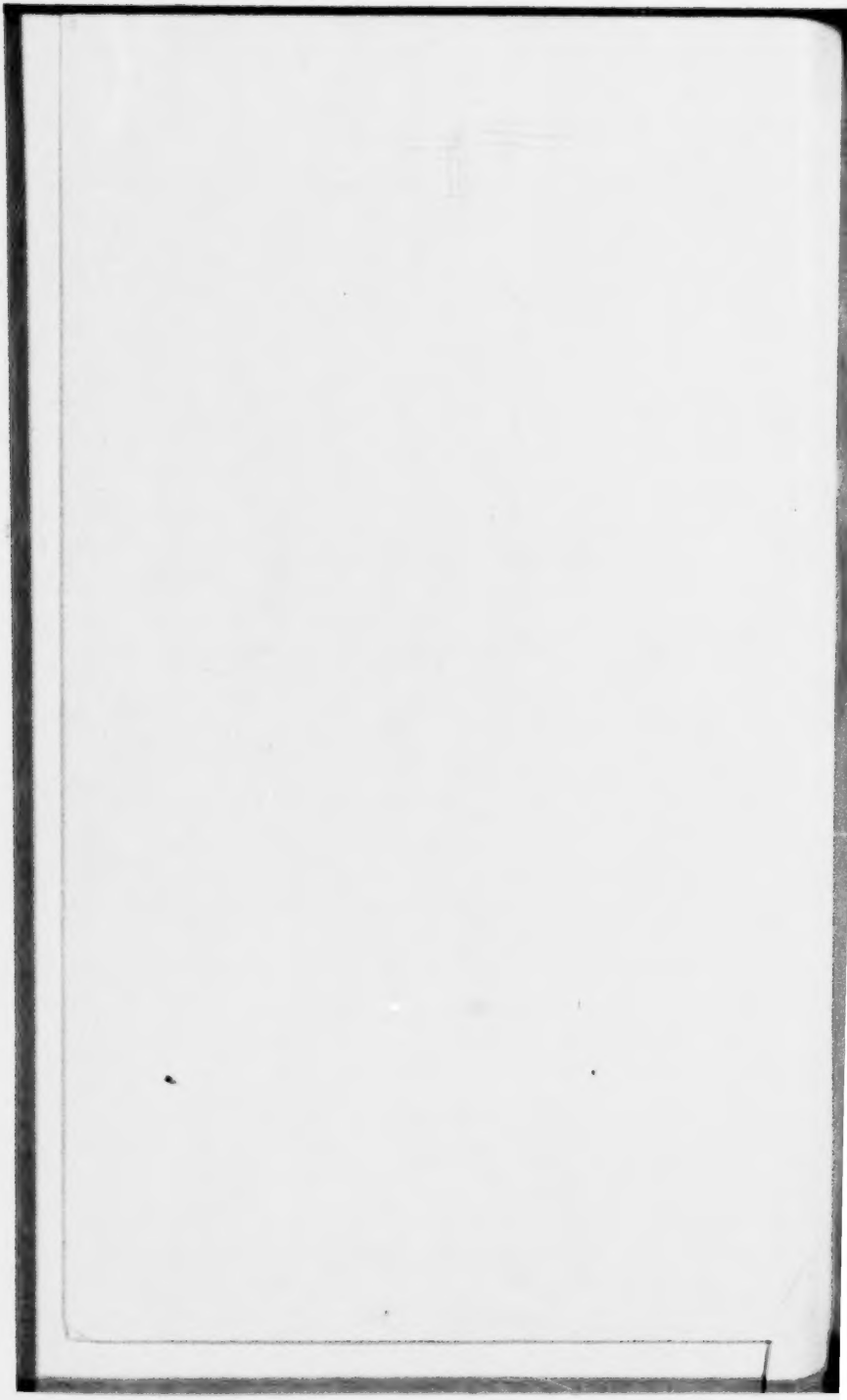

Eleventh-street viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct; and the Chicago, Burlington & Quincy Railroad Company, grantee and successor to the Missouri River Railroad Company in Nebraska and the Omaha & Southwestern Railroad Company, be and is hereby ordered, directed and required to repair that portion of said Eleventh-street viaduct commencing at the south end thereof, and extending northward a distance of one-third of the entire length of
19 said viaduct; the said repairs to be made in accordance with said plans and specifications and to be done under the supervision of the city engineer; the said repairs to be commenced without unnecessary delay and fully completed as herein required within ninety days from the passage and approval of this ordinance.

SEC. 3. That the city clerk be and is hereby directed to furnish to said Union Pacific Railway Company and to said Chicago, Burlington & Quincy Railroad Company owning or operating railroad tracks upon and across said Eleventh street under said Eleventh-street viaduct, a duly certified copy of this ordinance without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs.

SEC. 4. That this ordinance shall take effect and be in force from and after its passage.

Passed Jan. 30, 1894.

W. C. WAKELEY, *City Clerk.*
EDW. E. HOWELL,
President City Council.

Approved Feb. 2nd, 1894.

GEO. P. BEMIS, *Mayor.*

Afterwards, on the 19th day of January, 1895, an alternative writ of mandamus was issued herein as follows, to wit:

Alternative Writ of Mandamus.

THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator, *vs.* THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.	Alternative Writ of Mandamus.

20 The State of Nebraska to The Chicago, Burlington & Quincy Railroad Company, respondent above named, Greeting:

Whereas on the 19th day of January, 1895, there was filed with the clerk of the district court in and for Douglas county, Nebraska, a petition, duly verified by affidavit, praying for the issuance of a mandamus commanding and requiring you to repair the Eleventh-street viaduct, in the city of Omaha, as hereinafter ordered and required:

passed by the mayor and council of the city declaring the necessity for such viaduct, and that other proceedings were duly had by the mayor and city council in that behalf; but it denies that the viaduct was constructed by the Chicago, Burlington & Quincy Railroad Company and the said Union Pacific Railway Company or by either of them, but, on the contrary, alleges the fact to be that the city of Omaha constructed and completed the same and opened it for travel some time during the year of 1886.

Sixth. As to the several allegations contained in the several paragraghs of the relator's petition, including and following the sixth (6) paragraph thereof, this respondent has no knowledge or information concerning the matters and things therein stated, except as it is advised by the same, and therefore denies each and every thereof and asks that the relator make proof.

24 Seventh. This respondent, further answering, denies each and every allegation contained in the relator's petition, except such as are herein expressly admitted to be true.

Eighth. For further answer herein this respondent alleges that at and many years prior to the time when the proceedings were instituted and measures adopted upon behalf of the city to construct the viaduct aforesaid the city of Omaha was a municipal corporation of the first class created and existing under and by virtue of the laws of the State of Nebraska providing for the incorporation of cities of the first class, and by virtue of the act of the legislature aforesaid, entitled "An act to provide for viaducts, bridges, and tunnels in certain cases in cities of the first class" (approved March 4th, 1885), being chapter twelve (12) of the Laws of Nebraska, 1885, and contained in sections 110 to 115, inclusive, chapter thirteen (13) of the Compiled Statutes of the State of Nebraska of 1885, was vested with the power and authority, under certain circumstances and conditions therein provided for, to engage in the construction and maintenance of viaducts or bridges over railroad tracks occupying or crossing any of the streets, alleys, or highways within its corporate limits, and was also authorized by the provisions of said act to enter into agreements or contracts with any railway company or companies occupying any of the streets, alleys, or highways aforesaid for the purpose of securing from them the necessary payment or contribution of a certain portion of the moneys for the construction of such viaducts and the payment of damages arising therefrom.

25 Ninth. This respondent further alleges that at and for many years prior to the time when the proceedings were instituted to construct the viaduct on 11th street the city of Omaha was and had been divided by the grades and tracks of certain railway companies, so that the use of the several streets in said city intersecting or crossing said grades and tracks was inconvenient and at certain places, to wit, on 10th street, dangerous; that during these years intercourse between the portion of the city south and the portion of the city north of such grades and tracks was largely maintained by means of 7th, 10th, 13th. and 17th streets of said city; that for the purpose of providing greater facilities for the use

of the public between said portion- of the city the relator, duly authorized and empowered in that behalf, on the 1st day of February, 1886, entered into a written contract with the Union Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company, under the name and style of the Omaha & Southwestern Railroad Company, whereby it was agreed between them that the said railway companies, each for itself, would, at its own expense, open 7th, 13th, and 20th streets, in said city, through their respective rights of way, of certain widths, and also build retaining walls and make certain other suitable provisions for the convenient and safe use of said streets by the public, and would also each contribute certain proportions of three-fifths (3/5ths) of the entire cost and damages involved in the construction of certain viaducts upon 11th and 16th streets, such entire costs and damages for the 11th-street viaduct not to exceed the sum of ninety thousand ($90,000.00) dollars and of the 16th-street viaduct not to exceed the sum of thirty thousand ($30,000.00) dollars, and would also open 14th street through their respective rights of way at such time and of such character as future public necessity might require, and in consid-
26 eration of which the said city of Omaha agreed upon its part to construct and maintain the said viaducts and to pay two-fifths (2/5ths) of the entire cost and damages thereby incurred and to close 6th, 12th, and 15th streets, in said city, and to allow 14th, 18th, and 19th streets to remain in their then condition; a copy of this contract is hereto attached, marked "Exhibit A," and made a part hereof.

Tenth. The respondent further alleges that at and before the execution of the contract aforesaid ordinance No. 937, entitled "An ordinance authorizing the mayor by contract to grant to the Union Pacific Railway Company and the Burlington & Missouri River Railroad Company in Nebraska certain rights and privileges, subject to certain conditions," was duly adopted by the city council of said city, and on the 8th day of September, 1885, was duly approved by the mayor thereof, authorizing and empowering him to execute said contract for the city, and that subsequently, on the 1st day of February, 1886, James E. Boyd, then being the mayor of said city, and by virtue of his office and of the authority conferred upon him by said ordinance, executed the contract as hereinbefore alleged; that a copy of the ordinance referred to is hereto attached and marked "Exhibit B" and is made a part hereof and referred to for greater particularity.

Eleventh. And this respondent further alleges that by virtue of such agreement and in compliance with the terms thereof the said railway companies opened and improved said 7th, 13th, and 20th street- and paid or contributed to the city their said proportion of the cost and damages involved in the construction of the said viaducts, and have otherwise fully performed each and every stipula-
tion of said contract.

27 Twelfth. The respondent further alleges that under the laws of the State of Nebraska and by virtue of the powers and authority vested in it under its then charter, and in compli-

ance with the terms of the contract aforesaid, the city of Omaha constructed the viaducts upon 11th and 16th streets and opened the same for public use at the time stated in the relator's petition; that usbsequently the city council of said city adopted ordinance No. 2017, entitled "An ordinance granting the right to construct and use two (2) tracks over the 11th-street viaduct to the Omaha Motor Railway Company, subject to certain conditions," which was afterwards, on the 20th day of April, 1889, duly approved by the mayor of said city; that a copy of this ordinance is hereto attached, marked "Exhibit C," and made a part hereof; that by virtue of said ordinance, which was duly accepted by the said Omaha Motor Railway Company, it constructed two tracks over the said 11th-street viaduct in accordance with the provisions thereof and entered upon the occupation and use thereof; that from the completion of the viaduct aforesaid, the use thereof by the public, and from the completion of the tracks aforesaid, the use thereof by the said motor company, its successors and assigns, was continued uninterruptedly until some time during the year 1894, when it was discontinued by the public for vehicles and wagons and by the motor company, its successors or assigns, but was not discontinued for pedestrian travel.

Thirteenth. Respondent further alleges that the said 11th-street viaduct is and at all times since its construction has been the property of the city of Omaha and not the property of the said railway companies or either of them; and, further, that under the laws of the State of Nebraska and under the provisions of its former and present charters and under the contract aforesaid it was and
28 is the duty of the relator to maintain said viaduct in good condition for public use and to furnish the same with all repairs made necessary by ordinary wear.

Fourteenth. The respondent further alleges that owing to the condition of 10th street prior to the erection of the viaduct thereon at the place where it intersects and crosses the track of the respondent, The Union Pacific Railway Company, and of certain other railway companies and the danger incident to its use, public travel was largely diverted therefrom to 11th street and the viaduct thereon, and by reason thereof and the use of it by the motor company and the natural travel upon 11th street the flooring or planking of said viaduct became so worn as to require from time to time certain ordinary repairs to keep it in proper and safe condition; that the relator, however, disregarding its duty in that behalf, neglected to furnish these repairs as needed, and thereby permitted the said flooring or planking to become so worn and damaged as to render the further use of the viaduct by the said street railway company and by vehicles and wagons unsafe and dangerous.

Fifteenth. Respondent further alleges that since the construction of the viaduct on 11th street, to wit, on or about January 1st, 1891, a viaduct along 10th street and over the tracks aforesaid was constructed and completed and opened for public use and travel, and owing to the fact that it is much more convenient and safe for public use than 11th-street viaduct, it is and will continue to be occupied

and used by the street railway companies and the public which formerly occupied and used the said 11th-street viaduct.

Sixteen. And this respondent alleges the fact to be that should the several railway companies or any of them herein referred to, by means of extraordinary and summary proceedings of mandamus issuing out of courts having jurisdiction thereof, be compelled
29 to repair the said 11th-street viaduct in accordance with the demands of the city, it would be very little used by wagons or vehicles or by street railway companies, and it is therefore submitted that inasmuch as there is no pressing necessity for the immediate determination of the grave question of fact and law involved in this proceeding, the writ in this case should be denied and the relator remanded to such other redress as is amply provided for in such cases, to the end that the questions involved may receive thorough and careful consideration and trial in the usual and ordinary administration of law.

Seventeen. The respondent further alleges that the viaduct aforesaid covers a space on 11th street of about twelve hundred — fifty (1,250) feet, of which about 400 feet is occupied by the several tracks owned or operated by the railway companies above referred to; that the remainder of such space was, before the construction of the viaduct, somewhat occupied and used by the public for street purposes, and was, under the law, controlled and cared for by the city of Omaha; that the distance from the north line of the space occupied by the track aforesaid to the north line of the viaduct is about seven hundred feet, and this respondent submits that it is not competent for the legislature to put upon the railway companies the burden of maintaining or repairing that portion of the viaduct over such unoccupied space of the said street, as the city would, but for the existence of such viaduct, be required under the law to maintain and repair; that whatever the rule of law may be as to the construction of the viaduct, the city shall be required in any event to con-
30 tribute such proportion of the entire cost of its maintenance and repairs as that part of the street under the viaduct it would in the absence thereof be required to maintain and repair bears to the entire part of the street occupied by said viaduct, and it is submitted that any law authorizing and empowering the relator to impose such costs upon the railway companies named in its petition is unconstitutional and void and an arbitrary and unwarranted exercise of legislative power and contrary to the settled policy of the State of Nebraska and in violation of the several provisions of the constitutions thereof and of the United States.

Eighteen. Respondent further alleges that long prior to the time of the construction of its said single track across 11th street the said Union Pacific Railway Company had acquired and had been using for railway purposes rights of way across 11th street and had occupied the same with a large number of tracks, upon which it operated its trains, to wit, of the width of 300 feet; that, in order to utilize such right of way, it, at the time of the construction of said track, graded its right of way across said 11thstreet, there by leaving along the south line thereof a perpendicular bank of earth of at least

20 feet high; that at the time the respondent constructed its said single track it acquired the right from the city of Omaha, by ordinance, duly passed and approved, to lay the same across 11th street, occupying for that purpose a strip thereof about eight (8) feet in width; that it also at said time excavated said bank of earth for the distance of about 20 feet south of the south line of the Union Pacific Co.'s right of way aforesaid, leaving the said bank in about the same relative condition as the Union Pacific Company had left it, and in this behalf the respondent alleges that the danger incident to 11th street on account of the existence and operation of the said tracks of the Union Pacific Company aforesaid was not
31 materially increased by the acts of the respondent aforesaid, nor was the construction and maintenance of a viaduct upon said 11th street thereby rendered more necessary.

Nineteenth. Respondent further alleges that this track aforesaid is used solely for the purpose of operating a part of its through trains, freight and passenger, through the city of Omaha.

Twentieth. The respondent further alleges that the several tracks, in number about twenty-one (21), are used and operated by the Union Pacific Railway Company and certain other railway companies, as hereinafter shown, not only for their through business, freight and passenger, but also are used by certain of the companies aforesaid for the making up of trains, thereby bringing into constant use, day and night, the tracks aforesaid.

Twenty-one. For further answer respondent alleges that since the year 1886 the Chicago, Rock Island & Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, has opened a through line of railways, extending from Chicago, Illinois, through Council Bluffs, Iowa, Omaha and Lincoln, Nebraska, to Denver, in the State of Colorado, upon which it operates its freight and passenger trains between the several points aforesaid; that that part of said line extending through the city of Omaha comprises double tracks, which are located across 11th street, and are of the twenty-one (21) tracks above referred to, upon which it operates numerous daily freight and passenger trains, and also numerous special or extra trains, the number of which is unknown to your respondent.

32 Twenty-two. Your respondent further alleges that the Chicago, Milwaukee & St. Paul Railway Company, a corporation created and existing under and by virtue of the laws of the State of ——, has also since the year 1886 opened a through line of railways extending from Chicago, Illinois, to South Omaha, Nebraska, upon which it operates its freight and passenger trains between the points aforesaid; that that part of said line extending through the city of Omaha comprises double tracks, which are located across 11th street and are of the twenty-one (21) tracks above referred to, upon which it operated numerous daily freight and passenger trains, and also numerous special or extra trains, the number of which is unknown to your respondent.

Twenty-three. Respondent further alleges that at the time the railway companies last aforesaid opened their lines of railway

respectively through the city of Omaha as stated each of them acquired by contract of the Union Pacific Railway Company an interest and ownership in the tracks so as aforesaid used and operated by them and has ever since retained the same.

Twenty-four. Respondent further alleges that whatever danger may arise from the location and operation of the tracks herein described across 11th street to the public in the use thereof, or whatever necessities may thereby arise for the maintenance of the viaduct thereon, such danger and necessities arise as much from the use and operation of said tracks by the Chicago, Rock Island & Pacific Railway Company and the Chicago, Milwaukee & St. Paul Railway Company as arises from the use and operation of its single track by this respondent, and should in justice, equity, and law be required, with the other railway companies aforesaid, to contribute each its proper share to the repair and maintenance of said viaduct.

33 Twenty-five. This respondent, further answering, admits that in the year 1887 the legislature of the State of Nebraska passed an act entitled "An act incorporating metropolitan cities and defining, regulating, and describing their duties, powers, and government," by the terms of which all cities in the State of Nebraska then having a population of sixty thousand (60,000) inhabitants or more according to the State census of 1885 and all cities in said State who should thereafter attain a population of sixty thousand (60,000) inhabitants or upwards were declared to be considered and known as cities of the metropolitan class and should be governed by the provisions of said act; that the same was duly approved March 30th, 1887, and took effect from and after its passage; that at and before said date the city of Omaha, according to the State census of 1885, contained a population largely in excess of sixty thousand (60,000) inhabitants and by force of the provisions of said act became and was incorporated thereunder and has since been and is a city of the metropolitan class, subject to all the provisions of the act aforesaid so far as they are constitutional and valid; that by the terms of section forty-eight (48) thereof the mayor and council of said city were empowered to require railway companies owning or operating any railroad track or tracks upon or across any street or streets of the city of Omaha to erect, construct, reconstruct, complete, and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including such viaduct or viaducts as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. Such section also contained several other clauses relating to the subject of viaducts, among them one providing that when two or more railroad companies owned or operated separate lines of track to be crossed by any such viaduct the

34 proportions thereof and of approaches thereto to be constructed by each or the cost to be borne by each to be determined by the mayor and council; also that after the completion of such viaduct the revenue derived therefrom from street railway lines or other lines shall constitute a special fund to be applied to

making repairs to such viaduct, and, furthermore, that all ordinary repairs to any such viaduct or to the approaches thereto should be paid out of such fund or should be borne by the city.

Respondent further alleges that said act contains provisions amending the several provisions of the acts relating to cities of the first class and certain general laws of the State of Nebraska, and also repealing certain provisions of said acts and said laws without making reference thereto in the title, as required by several provisions of the constitution of the State of Nebraska.

This respondent further submits that, so far as the provisions of the act above referred to relating to cities of the metropolitan class are concerned, they do not apply either to 11th-street viaduct or to any other viaduct built prior to the passage of the act, but only to such viaducts as may have been or may be thereafter constructed under its provisions.

Respondent further submits that it is not competent for the legislature to impose upon it the duty of maintaining or repairing the 11th-street viaduct, for the reason that to do so would be in violation of the obligations of the contract hereinbefore recited and contrary to the provisions of the Constitution of the United States.

Respondent further submits that in the allegations contained in the relator's petition wherein is described the several proceedings in its city council and board of public works, as well as
35 the several acts alleged to have been performed by its representatives and officials relating to the repair of the 11th-street viaduct aforesaid, the same were wholly unauthorized and unwarranted and of no effect so far as the respondent is concerned; that the omission of any and all reference to the several railway companies owning and operating tracks across 11th street under the said viaduct, as hereinbefore shown, renders such proceedings unwarranted, arbitrary, unjust, and illegal.

Wherefore your respondent denies that it is liable or bound to maintain or keep in repair or to contribute thereto the said 11th-street viaduct.

Twenty-six. This respondent, further answering, alleges that the Union Pacific Railway Company has heretofore refused and still refuses to recognize the right of the city of Omaha to require it to contribute towards the repair or maintenance or reconstruction of the said 11th-street viaduct, and has refused and still refuses to comply with the ordinance and requirements of the said city in that behalf.

Twenty-seven. Further answering, your respondent submits that the court is powerless in this case to grant the prayer of the relator's petition filed herein, for the reason it is in the nature of an application for a writ of mandamus against the respondent to compel it to repair and maintain a part of the 11th-street viaduct; that the only remedy asked is a mandatory order upon this respondent; that this court is wholly without jurisdiction to proceed by mandamus or other compulsatory process to compel the respondent to repair and maintain the said viaduct.

36 Twenty-eight. Respondent further alleges that G. W. Holdrege is its general manager and chief executive officer west of the Missouri river; that he resides in Omaha, Nebraska, and is within the jurisdiction of this court; that the president and vice-president, stockholders and directors, each and every of them, reside out of the jurisdiction of this court and are at all times beyond the reach of its process; that some of them reside in the various States of the Union, particularly in Iowa, Illinois, and Massachusetts; that none of them reside in the State of Nebraska; that the said G. W. Holdrege, as such general manager or chief executive officer as aforesaid, is wholly without the power or authority to order the maintenance or repair of said viaduct and without power or authority to appropriate any moneys belonging to the company for that purpose; that such authority and appropriation must come, if at all, through the action of the president and board of directors and not otherwise. Wherefore respondent submits that inasmuch as no writ can issue against the property of this respondent, but must be issued against some person having full power and authority to comply with the order made, and inasmuch as the said Holdrege has not the power or authority to comply therewith, and inasmuch as the officers and directors who could comply with the order are beyond the jurisdiction of this court and beyond the reach of its process, it is therefore respectfully submitted that the relator should be remitted to such remedies and proceedings as can be enforced against the property of the respondent and not otherwise.

Twenty-nine. Respondent further alleges that according to the plans and specifications referred to in the relator's petition the estimated cost of repairing the 11th-street viaduct will be about $13,440.00, and that the relator is in this proceeding asking
37 that the respondent be compelled to repair the north one-third (⅓rd) of the viaduct without regard to whether the cost of repairing such portion will be one-third (⅓rd) of the cost of repairing the entire viaduct, and it is submitted that the question of apportioning the costs of the said repairs between the several railway companies referred to is one for the courts, and this respondent submits that there are no facts stated in the relator's petition upon which it can be judicially determined what will be a fair and equitable distribution of the said cost of repairs among the several railway companies liable, if they should be so held therefor.

Thirty. This respondent further alleges the fact to be that the attempt of the city council and board of public works, described in the relator's petition, to apportion the cost of repairing and maintaining the north one-third (⅓rd) of the said viaduct to this respondent was and is arbitrary and unwarrantable, *u*nequitable, and a*n* discriminating act against it, and is also without jurisdiction or support either in law or in equity.

Thirty-one. Respondent further submits in this behalf that whatever view the court may take of the law or of its obligations in the premises it is incompetent for the relator to either select or prescribe the material for or the cost of the repairs necessary for said viaduct; that such question is brought into court only for its con-

sideration and determination, and that in the absence of any showing the court ought not to issue the peremptory writ of mandamus.

Wherefore your respondent alleges that no claim at law or in equity exists in behalf of the relator against it, and asks that the writ herein prayed for be denied, and that it be dismissed hence without costs.

38 CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, *Respondent*,
By CHARLES J. GREENE.

STATE OF NEBRASKA, } ss:
Douglas County, }

Charles J. Greene, being first duly sworn, on his oath says that the defendant is a corporation; that he is its attorney and is acquainted with the facts alleged in the foregoing answer, and that the same are true, as he verily believes.

CHARLES J. GREENE.

Subscribed in my presence and sworn to before me this 6th day of March, A. D. 1895.

E. S. GARRETT,
Notary Public.

[SEAL.]

"EXHIBIT A."

Viaducts—11th and 16th streets.

Articles of agreement, executed in triplicate, made and concluded this first day of February, 1886, by and between the City of Omaha party of the first part, and the Union Pacific Railway Company and the Omaha & Southwestern Railroad Company, parties of the second part, witnesseth:

That the said parties of the second part, in pursuance of the provisions of an act of the legislature of the State of Nebraska, entitled "An act to provide viaducts, bridges and tunnels in certain cases in cities of the first class," do hereby assume and agree to pay as may be required by the mayor and city council of said city three-fifths of the entire cost of constructing a viaduct along Eleventh street and three-fifths of the damages to abutting property on
39 account of the construction of such viaduct not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of ninety thousand dollars ($90,000.00), the amount so assumed and agreed to be paid, being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part, as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company, and one-fourth thereof to be paid by said Omaha & Southwestern Railroad Company.

The said parties of the second part, in pursuance of the provisions of said act, also assume and agreee to pay, as may be required by said mayor and city council, three-fifths of the entire cost of con-

structing a viaduct along Sixteenth street in said city over the railroad tracks of said parties of the second part, and three-fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of thirty thousand dollars ($30,000) the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part, as follows: Two-thirds thereof to be paid by said Union Pacific Railroad Company, and one-third thereof to be paid by said Omaha & Southwestern Company.

The plans and specifications for said viaducts before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part, and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective pro-
40 portions of such increased cost and damages, in the same manner and according to the same division as hereinbefore agreed.

The said parties of the second part also agree, during the present year (1886) to open Seventh street in said city through their rights of way, so as to leave a clear and unobstructed roadway fifty feet in width from curb to curb, and sidewalks ten feet in width on each side of said roadway and outside of said curbs, thereby making a total opening of seventy feet, and to build proper, substantial stone retaining walls on the outside of said walks, and make sufficient and suitable provisions for lighting said walks and roadway, and thereafter, both day and night, keep said walks and roadway well and sufficiently lighted, so as to enable teams and pedestrians, at all times, to use the same, the said parties of the second part to have the right to place iron posts in line with said curbs, to support the superstructure or bridge over the same.

The said parties of the second part also agree to open Thirteenth street in said city through their rights of way, so as to leave a clear and unobstructed roadway sixty feet in width from curb to curb, and sidewalks twenty feet in width on each side of said roadway and outside of said curbs, thereby making a total opening of one hundred feet, and to build proper, substantial stone retaining walls on the outside of said sidewalks, the said parties of the second part to have the right to place iron posts in line with said curbs to support the superstructure or bridge over the same.

The said parties of the second part also agree to open Twentieth street in said city through their rights of way to the full width of said street.

41 In consideration of the full performance by said parties of the second part of the foregoing agreements, the City of Omaha, party of the first part, hereby agrees by ordinance, to close the following streets across the present rights of way of said parties

of the second part, to wit: Sixth street, Twelfth street, Fifteenth street.

It is also agreed that Eighteenth and Nineteenth streets in said city are to remain as at present.

It is also agreed that Fourteenth street in said city across the present rights of way of said parties of the second part, shall remain the same as it now is until the completion of said Sixteenth-street viaduct, and then, if it shall be declared by the mayor and council that public necessity demands, it shall be opened by said parties of the second part in such manner as the mayor and council may require, not exceeding thirty feet in width.

In witness whereof, the said parties hereto affix their names at Omaha, Nebraska, this first day of February, 1886.

(Signed) THE CITY OF OMAHA,
By JAMES E. BOYD, *Mayor.*
UNION PACIFIC R'L'Y CO.,
By S. R. CALLAWAY, *General Manager.*
OMAHA & SOUTHWESTERN R. R. CO.,
By G. W. HOLDREGE.

In presence of—
H. KOUNTZE.

"EXHIBIT B."

Ordinance No. 937.

An ordinance authorizing the mayor by contract to grant to the Union Pacific Railway Company and the Burlington & Missouri River Railroad Company in Nebraska certain rights and privileges, subject to certain conditions.

42 Be it ordained by the city council of the city of Omaha:

SECTION 1. That the mayor of the city of Omaha be, and hereby is, authorized and empowered to enter into an agreement and contract with the Union Pacific Railway Company and the Burlington & Missouri Railroad Company in Nebraska, whereby, in consideration of the said railroad companies assuming three-fifths of the cost, including damages to abutting property, of a viaduct crossing the railroad tracks of said companies on Eleventh street in said city, commencing at or near Jackson street and extending to or near Mason street, according to such plans as may be adopted by the mayor and council, the same to be constructed as soon as possible, and as soon as said mayor and council may require, and complying with an act of the legislature of the State of Nebraska, entitled "An act to provide for viaducts, bridges and tunnels in certain cases in cities of the first class," approved March 4th, 1895, the city will close Sixth street from the north line of Pacific street to the south line of the alley between Mason and Marcy streets, and Twelfth street between blocks 201 and 202, and so much of Marcy street as lies in line of Twelfth street and is covered by right of way. The city, in consideration of the premises, is also to

permit and allow said companies, at their own expense, to bridge Seventh street in said city along their respective rights of way, but in such manner as will leave a clear roadway of fifty feet from curb to curb, and a space of ten feet outside of said curb for sidewalks, and so as to allow reasonable and proper ventilation and admit sufficient light, the said companies, at their own expense, to keep the space under the portions of the bridge constructed by each respectively sufficiently lighted at all times by either natural or artificial light, and said companies are also to have the right to
43 bridge Thirteenth street, but so as to leave a clear roadway of sixty feet from curb to curb and a space on the outside of each of said curbs of twenty feet for sidewalks, and so as to admit of ventilation and light, and are also to have the right to place iron posts for the support of said bridges over said Seventh and Thirteenth streets, on the line of said curbs.

SECTION 2. This ordinance shall take effect and be in force from and after its passage.

Approved September 8, 1885.

"EXHIBIT C."

Ordinance No. 2017.

Omaha Motor Railway Company to Use Eleventh-street Viaduct.

An ordinance granting the right to construct and use two tracks over the Eleventh-street viaduct to the Omaha Motor Railway Company, subject to certain conditions.

Be it ordained by the city council of the city of Omaha:

SECTION 1. That the right to construct and use two tracks over and along the Eleventh-street viaduct, in the city of Omaha, is hereby granted to the Omaha Motor Railway Company of Omaha, subject to the following conditions, to wit:

The said Omaha Motor Railway Company shall obtain such changes as may be necessary in the roadway of said viaduct for the purpose of laying said tracks, and pay the cost thereof, as well as all costs or expense caused or made by reason of laying said tracks on said viaduct; and shall keep said tracks in good condition and pave and repave between the rails of said tracks, as its own expense, at such times and in such manner as the mayor and city council may by ordinance require.

44 SEC. 2. Said motor railway company, after entering upon said viaduct for the purpose of laying their tracks, shall prosecute the work with all possible speed and complete the same without delay, and with the least possible inconvenience to the public use of said viaduct; and the rails to be used on said viaduct shall have wide flanges so as to accommodate the wagon travel of the viaduct; and the rails shall be kept on a level with the general roadway. Said work shall be done under the supervision and direction of the city engineer and board of public works.

SEC. 3. The use of said tracks by said company, and the manner and time of running cars thereon, shall at all times be subject to such reasonable rules and regulations as may be prescribed by ordinance.

SEC. 4. The tracks over and along said viaduct, and the approaches and tracks leading to said viaduct to the distance of 600 feet from either end of the viaduct, may be used by such other street railway companies as the mayor and council, by ordinance, may grant the right so to do, upon such terms and conditions as may be by ordinance provided.

SEC. 5. The rights and privileges herein granted are upon the further condition that for the use of said viaduct said Omaha Motor Railway Company shall pay for the first five years a nominal rental of five ($5.00) dollars per year, and such other railway companies to whom may be granted the right to cross said viaduct shall be governed by the same condition.

The said Omaha Motor Railway Company, or other companies to whom the right may be granted upon the expiration of said five years shall pay such reasonable annual rental to the city as may from time to time be fixed and determined by ordinance.

45 SEC. 6. The said Omaha Motor Railway Company, shall within six months after the passage of this ordinance, operate a double-track line of street cars across said viaduct along Eleventh street as far south as Vinton street, and shall hereafter continue to operate said line in the manner herein prescribed.

SEC. 7. The rights and privileges herein granted are also subject to the approval of the railroad companies contributing toward the construction of said viaduct.

SEC. 8. The said Omaha Motor Railway Company shall protect the city against any claim or action for damages resulting from the use of said viaduct by said company, or which may be caused by the negligence of said company.

SEC. 9. The Omaha Motor Railway Company, to obtain any right or benefits granted, shall, within thirty days from the passage of this ordinance, file with the city clerk a written acceptance of all the provisions and conditions hereof; but such acceptance shall in no event be construed as a waiver of any existing rights conferred upon such company by its charter.

SEC. 10. The Omaha Motor Railway Company shall, at the time they accept the provisions of this ordinance, file a bond with the city in the sum of twenty thousand ($20,000) dollars for the faithful performance of the provisions of the ordinance; said bond to be signed by two sureties, subject to the approval of the mayor and city council.

If the Omaha Motor Railway Company, after it shall accept the terms and conditions of this ordinance, shall fail to comply with the terms and conditions of this ordinance, then the Omaha Motor Railway Company shall forfeit its rights under this ordinance, whenever the mayor and council shall so determine by ordinance or concurrent resolution.

46 SEC. 11. That this ordinance shall take effect and be in force from and after its passage.

Approved April 20th, 1889.

Accepted by Omaha Motor Railway Company April 23, 1889.

Afterward, on the 10th day of April, 1895, this cause came on to be heard before his honor Judge G. W. Ambrose upon the petition and answer herein and the evidence in support thereof and was duly submitted.

Afterward, on the 19th day of April, 1895, and after due consideration, a decision herein was rendered and filed herein as follows, to wit:

Opinion of Court.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator,
vs.
THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.
} Opinion of the Court.

Opinion by AMBROSE, judge, of February term, 1895:

This is an application for the issuance of a peremptory writ of mandamus to compel the respondent to repair the south one-third of the viaduct on Eleventh street between Mason and Jackson.

It is claimed by the relator that under and by virtue of the terms of section 48 of the act of the legislature of 1893 relating to metropolitan cities, that it is within the power of such cities to compel railroad corporations like the respondent to repair such viaducts. So much of said section as is relevant is as follows:

"The mayor and council shall have the power to require any railway company or companies owning or operating any railway track or tracks upon or across any public street or streets of
47 the city, to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets, and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and city council necessary for the safety and protection of the public." * * *

Under the power thus granted the proper city authorities, in December, 1893, declared, by proper and appropriate legislation, the necessity for requiring this viaduct to be repaired, in order to protect the safety of the public. No contention is here made as to the regularity of such proceedings. The Chicago, Burlington & Quincy railroad is the successor of what was formerly known and incorporated as the Omaha & Southwestern railroad. That railroad was incorporated under an act of the legislature in force in the year 1866, and the contention is made that by reason of the act of the legislature

under which the then incorporation was had, that it is not within the power of the legislature now to impose the additional burden sought to be imposed by reason of section 48 of the act of 1893.

Section 83 of chapter 25—subdivision, railroad companies—of the act of 1866 is as follows:

"If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officers or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied;" * * *

48 By section 86 of the same act it is provided:

"Any railroad company may construct and carry their railroad across, over or under any road, railroad, canal, stream or water-course, when it may be necessary in the construction of the same; and in such cases said corporation shall so construct their railroad crossing as not necessarily to impede the travel, transportation or navigation upon the road, railroad, canal, stream or water-course so crossed."

In March, 1885, an act to provide for viaducts, bridges, and tunnels in certain cases in cities of the first class, such as Omaha, there was provided that the mayor and city council of such city should have the power under certain circumstances to engage and aid in the construction of any viaduct by contract and agreement with railroad companies. This act was simply permissive; there was nothing mandatory about it. Under the powers thus granted in February, 1886, the city of Omaha, the Union Pacific Railway Company, and the Omaha & Southwestern Railroad Company entered into a contract for the erection of the Eleventh-street viaduct. It is unnecessary at this time to enter into a full understanding of what the terms of that contract were, except to say that by the terms of the contract thus voluntarily made between these three parties it was provided that the railroad companies should pay three-fifths of the cost of the construction and the damages to abutting property-owners, and the city two-fifths. In the apportionment between the two railroad companies this respondent company was to pay one-third and the Union Pacific Railway Company two-thirds of the three-fifths. Under this contract the viaduct was built and has become fully executed.

In 1887, two years after the passage of the last act mentioned, and by the terms of section 48 of the act, then for the first

49 time creating incorporations of metropolitan cities, it was provided: "That the mayor and council shall have the power to require any railroad company, or companies owning or operating any railroad track or tracks upon or across any public street or streets of the city, to erect, construct reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets, and over or under such track or tracks, including the approaches to such viaduct or viaducts as may be deemed and declared

by the mayor and council necessary for the safety and protection of the public."

It was further provided in the same section: "After completion of any such viaduct, any revenue derived therefrom by the crossing thereof of street railway lines, or otherwise, shall constitute a special fund, and shall be applied in making repairs to such viaduct. All ordinary repairs to any such viaduct, or to the approaches thereto, shall be paid out of such fund, or shall be borne by the city." This is the first time that any mandatory legislation was passed by the legislature.

It will be seen by a careful reading of the section just referred to that while the legislature granted the power to cities of the metropolitan class to require railroad companies to keep in repair any such viaduct as the one here in question, it was also provided that ordinary repairs should be paid out of the fund derived from the revenue of street railway lines, or otherwise, or shall be borne by the city. Thus the legislation rested until the passage of the act of 1893, to which I have above referred. In addition to the power granted to the mayor and common council to require any railway company or companies to construct, reconstruct, and keep in repair any viaduct, which I have already quoted, it was further provided:

50 "When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct the proportion thereof and all the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. It shall be the duty of any railroad company or companies upon being required as herein provided, to erect, construct, reconstruct or repair any viaduct, to proceed within the time and in the manner required by the mayor and the council." * * *

And then follows to the end of the section certain remedies for the enforcement of the duty thus required.

Under this legislation an extended and very vigorous argument has been made, the contention being that by reason of the legislation of 1866 and the constitution of this State in force at the time of the organization of the Omaha & Southwestern Railroad Company it is beyond the power of the legislature to impose the burden now sought to be imposed under the act of 1893, for the reason that the charter of the respondent railroad company was a contract, and any such attempt as is now here sought by this legislation is an impairment of the obligation thus created between the State and the respondent company.

If such be the law of the land, it is as well now as ever that this State become aware of it. A corporation is but a creature of the sovereignty. Corporate property has a public as well as a private si'e. Does the State, by granting charter rights to corporations, completely abnegate to and surrender control of these public agencies? Every person, human or artificial, holds his or its property subject to the control of the State whenever the public peace or safety is in question. Any contrary doctrine would be the

51 announcement of the right of private and corporate socialism,

either of which is a public as well as a private menace, and, independent of authority, upon principle alone, I for one should have no hesitation in saying that by the granting of the privilege to any number of individuals to form a corporate existence that the State does not thereby surrender all power and control over such a corporation.

As is said by that eminent jurist and law-writer, John F. Dillon, American Law Review, March and April, 1895: "The domain of the State over the action of its corporations is supreme within the limits of their constitutional rights, which are mainly rights of property. The State may with strong hand suppress every form of combination, whether corporate or individual, which proves hurtful to the general good. The State can bridle its corporate agencies and keep them under effective and salutary control; it can forbid all persons, whether corporate or natural, from courses of action harmful to the public welfare. * * * The State's plain duty is to see that the just interests of the public are protected and secured, so far as law can do this consistently with the rights of others. * * * The principle on which the State may intervene is plain. If and in so far as such combination shall be found tending to create monopolies, to destroy legitimate and useful competition, thus interfering with the free industry of the people, yield undue profits at the expense of the consumer, thereby facilitating the creation of enormous private fortunes and the protection of the inequality of wealth—if such shall be seen or found to be their effect, the State has the power to correct the evil, and it would be its duty to call that power into vigorous activity."

52 If the State has this power, can it be doubted that notwithstanding the fact there was no limitation of the constitution of 1866 or the acts of the legislature passed in conformity thereto that the legislature now has the power to regulate the running of the trains of the respondent company over or across the street in question or from providing any safe transit for the commerce of the city over its railway tracks? Such an invasion upon the power of the legislature would be a complete surrender of the streets of the city to the control of the railroads and make the use of the streets for its municipal commerce subject to the whim of every railway corporation passing through the municipality.

Take, for instance, the litigation that sprung up in this city several years ago over the construction of our present street-car system. The legislature of 1866 passed a special act granting to the Omaha Street Railway Company the exclusive privilege of laying its tracks and operating a line of street railway within the city of Omaha. Under the constitution of 1875 and legislation subject thereto another corporation was formed, known, in short, as the Mercer corporation. Immediately upon an attempt to use the streets in the city serious litigation arose, and it was carried into the Federal courts. There the plea was strongly urged, and by some of the greatest lawyers in the country, that the original corporation had exclusive franchise in the streets in the city of Omaha, and that it was incompetent for the legislature to confer the power upon any

other set of men to organize a corporation and divest them of their rights under their original charter. Judge Brewer, sitting upon the circuit bench, held to the contrary.

53 Every citizen when he comes within the confines of this State does so with the knowledge that he will be allowed to operate his business affairs and conduct and control his property according to the law then in force, and also in accordance with such amendments imposing additional burdens thereon as shall in the wisdom of the legislature seem beneficent and for the best promotion of the public good.

The case of Jones *vs.* Davis, 6 Neb., 33, arose by reason of legislation which was passed after the execution of the mortgage involved in that suit, and which legislation changed the mode of ascertaining the value of property prior to its sale. Under the law as it stood when the contract was executed the appraisement was required to be made regardless of any incumbrances that might be resting upon it, and the sale must have been for at least two-thirds of the value of the property thus ascertained while under the legislation in force when the foreclosure took place; incumbrances were to be deducted, and from the sum total thus derived the sale was to be had for two-thirds of the then value. It was strenuously urged in that case, and supported by authority, not only of the Supreme Court of the United States under similar legislation in the State of Illinois, but from a variety of the States in the Union, that such a change of the legislation was an impairing of the obligation of the contract. But the supreme court of this State held otherwise—that it did not in the least effect the obligation of the contract.

In State *vs.* Missouri Pacific R'y Co., 5 Pac. Rep., 772, is a case much like the one in question. It is said:

54 "A railroad company is a quasi-public corporation, and all its rights and powers are conferred upon it, not merely for the benefit of the corporation itself, but also in trust for the benefit of the public, and whenever it neglects or fails to perform any of its corporate duties it may be compelled to perform the same by mandamus. The duty resting upon a railroad corporation to perform whatever has been legally enjoined upon it by legal and proper authority is a duty resulting from a public trust and is also a duty resulting from a public station, and the public may enforce the performance of such duty by mandamus whenever no other plain and adequate remedy exists. * * *

"The question is," continues the court, "whether a city of the first class has the power to order a railroad company to construct a viaduct over its tracks when the same cross a public street. We think it is. In this State all cities are invested with entire management and control of public streets within their boundaries. They are the representatives of the public in this respect, and may generally make any order concerning the streets that could be made by the legislature or by any other agency or instrumentality acting for the public." * * *

And further: "A railroad company has no right to render the streets of a city unsafe or dangerous, and in all cases where a rail-

road company is permitted to use a street for railroad purposes it should be compelled to restore the street, as far as practicable, to the same condition of safety and usefulness as the street would occupy if it were not used for railroad purposes at all, and the railroad company should be compelled to maintain this condition of safety and usefulness as long as it continues to use and occupy the street."

55 This is supported by a long line of authorities. The legislation in Kansas was subsequent to the incorporation of the defendant railroad company.

The finding of the proper city authorities under the legislation which has taken place under the act of 1893 is that this viaduct is dangerous. This is not questioned by the respondent.

In section 1054, second volume, Morawetz on Corporations, that author says, in speaking of the power of amendment of articles of incorporation and the impairment thereby of contract rights: "At the present day, however, corporations are usually formed under general laws, which extend the right of forming corporations to all persons. There is no more reason for holding that the formation of a corporation pursuant to such general law gives rise to a contract with the State than that the formation of a limited partnership or joint stock company or the execution of any other executory contract authorized by the general law involves the creation of a collateral contract with the State that the parties to the agreement shall be allowed to perform." The same author says, paragraph 1062: "That corporations are subject to the law-making power of the State to the same extent as unincorporated individuals is obvious. When the legislature of a State grants to a number of persons the right of forming a corporate association it clearly does not intend to emancipate them forever after from the law-making power of the State in respect to their corporate acts and rights, nor would the legislature have the power to do this."

It is claimed by counsel for respondent that the legislation of 1893, section 48, wherein it provides that the duty required of railroads to construct, reconstruct, and repair viaducts may be enforced by mandamus or by fine, or that if the company

56 should refuse to obey the demand of the city to construct or repair such viaduct that the city may do so and collect the necessary cost from the defendant company, is unconstitutional, and that such legislation is not germain to the original section 48 as it stood in the act of 1887, which was amended by the act of 1893.

I do not consider the determination of this question material in this case. The remedy by mandamus to enforce this duty and obligation of a railroad company was sufficient without this legislation. State *vs.* C., B. & Q., 29 Neb., 413.

That portion of the section referring to the right of the city to construct and then collect from the defendant company is but cumulative, made so expressly by the very terms of the section, but without the express terms of this section making this remedy cumulative it has been repeatedly held in this State that notwithstand-

ing there may be a cumulative remedy that that will not prevent the court from granting the writ of mandamus.

While no contention is made as to the sufficiency of the proceedings under the legislation of 1893 by the mayor and city council, yet it is urged that the arbitrary finding in this case requiring the respondent to repair the south one-third of the viaduct is inequitable under the facts as here developed. These facts are, shortly: At the time this viaduct was built, as already indicated, it was by contract between the city and the two railroad companies then operating the line of tracks across Eleventh street. The respondent company owns and operates one track. The Union Pacific Railway Company, together with the Milwaukee and the C., R. I. & P. Railway Companies, occupy and operate the remaining twenty-one tracks. Under the original contract the Union Pacific was to pay two-thirds of the three-fifths and this respondent one-third of the three-
57 fifths of the cost of construction of the viaduct. Since then the Milwaukee and C., R. I. & P. Companies have by lease acquired from the Union Pacific Railway Company, which practically amounts to an ownership, the right to operate these tracks.

Under legislation of 1893 it is provided that the city shall have the power to require railroad companies owning or occupying the tracks to construct, reconstruct, and repair the viaduct.

Under this state of facts it seems to me that the arbitrary requirement of the absolute repair of one-third of the viaduct in question is inequitable, but the power to so require is vested by the legislature absolutely in the city council; yet the supreme court of this State in the case of Hanscom *vs.* Omaha, 11 Neb., 42, refused to sanction the absolute authority of the city council upon a question of like import. I do not now intend to decide whether the requirement in behalf of the city is equitable and just or not. So far as I may and make this order final, I desire to reserve that question for future consideration, and if, in the judgment of the supreme court, the solution arrived at by me is correct, then the question of determining the proper proportion to be borne by this respondent, in view of the above facts, will be further considered and ultimately determined. With this simple expression of what I deem should be the ultimate result of this case, the writ of mandamus will issue as prayed.

Afterward, on the 20th day of April, 1895, a motion for new trial was filed herein as follows, to wit:

Motion for New Trial.

In the District Court of Douglas County, Nebraska.

58 THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator, *vs.* THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent. } Motion for New Trial.

Comes now The Chicago, Burlington & Quincy Railroad Company, respondent herein, and moves the court to vacate the judgment and final order heretofore rendered herein and to grant a new trial for the following reasons:

1. The judgment is not sustained by any evidence.
2. The judgment is against the weight of evidence.
3. The judgment is contrary to law.
4. The court erred in admitting testimony offered by relator and objected to by the respondent and to which in that particular respondent then and there excepted.
5. The court erred in excluding testimony offered by the respondent, to the ruling of which in that particular the respondent then and there excepted.
6. Errors of law occurring at the trial and duly excepted to by the respondent.
7. The court erred in granting a peremptory writ of mandamus herein.
8. The court erred in holding that the relator had any power or authority to require or compel the respondent to repair the 11th-street viaduct.
9. The court erred in holding that relator had any power conferred on it by virtue of chapter twelve of the Compiled Statutes of Nebraska, 1893, to require respondent to repair the 11th-street viaduct or any part thereof.

59 10. The court erred in holding that the provisions of section 48 of the charter creating cities of the metropolitan class, as amended in 1893, did not impair the obligations arising out of the contract between this respondent and the relator relative to the construction of the 11th-street viaduct.

11. The court erred in holding that the relator, under the terms of the contract of 1886 between the relator and this respondent and the laws, then subsisting relative thereto and subsequent amendments, was not bound to repair the 11th-street viaduct.
12. The court erred in not holding section 48 of an act entitled "An act incorporating metropolitan cities, etc.," as amended in 1893, unconstitutional.
13. The court erred in failing and refusing to determine and adjudicate the issues made by the pleadings in this case.
14. The court erred in failing and refusing to determine the sufficiency, validity, and constitutionality of ordinance No. —, a copy

of which was attached to the respondent's answer marked Exhibit —, and by way of reference made a part thereof.

15. The court erred in holding that the charter of the predecessor of this respondent and an ordinance No. 729 of the relator did not constitute a contract between this respondent within the meaning and protection of the constitution of Nebraska and the United States guaranteeing the inviolability of contracts.

16. The court erred in holding that the State of Nebraska had any warrant or authority to alter or amend the charter of this respondent or its predecessor under the corporate name of the Omaha & Southwestern Railroad Company.

60 17. The court erred in holding that the alleged right in the relator to require this respondent to repair the 11th-street viaduct as expressed in section 48 of the act creating metropolitan cities, as amended in 1893, was an exercise of power reserved in the legislature to alter or amend the charter of this respondent.

18. The court erred in holding that the provisions of section 48 of the act relating to metropolitan cities as amended in 1893, requiring railroads to repair viaducts, was in virtue of the police powers of the State of Nebraska.

19. The court erred in holding that section 48 of the chapter relating to metropolitan cities, as amended in 1893, had any reference to viaducts theretofore constructed.

20. The court erred in holding that section 48 of the charter relating to metropolitan cities, as amended in 1893, had any reference to the repair of the viaduct in controversy or any other viaduct then in existence.

21. The court erred in holding that the relator was not bound as a matter of law to repair the viaduct in controversy.

22. The court erred in exercising jurisdiction herein for the reason that there was a defect of parties respondent.

23. The court erred in holding that relator had any authority conferred on it by section 48 of the charter relating to metropolitan cities and, as amended in 1893, to determine upon and select the materials for the repair of the viaduct in controversy.

24. The court erred in holding that the relator had no adequate and clear remedy provided by law for the repair of the viaduct in controversy.

61 25. The court erred in compelling this respondent to arbitrarily repair one-third of the viaduct in controversy, when, as a matter of fact, this respondent only owned and operated a single track out of twenty-one or more tracks which crossed 11th street under said viaduct, that requirement being arbitrary, unjust, inequitable, unreasonable, and unconstitutional.

26. The court erred in granting the writ herein for the reason that obedience to the commands of the same by this respondent would not repair the viaduct in controversy.

27. The court erred in granting the writ herein for the reason that the Union Pacific Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company, which own and operate, either jointly or sev-

erally, twenty or more of the tracks which cross said 11th street beneath said viaduct, are necessary parties in order to determine the proportion each should bear, including this respondent, in the cost of or the repair of the viaduct in controversy.

28. The court erred in not holding that the repairs sought to be made in this case was an exercise of the police power of the State.

29. The court erred in holding that the several remedies provided for in section 48 of the charter relating to metropolitan cities, as amended in 1893, were cumulative.

30. The court erred in holding that the ordinance of the relator, marked Exhibit —, attached to the respondent's answer and by way of reference made a part thereof, was without authority, unwarranted, and void, in this: that it exempted the Chicago, Rock Island and Pacific Railway Company and the Chicago, Milwaukee &
62 St. Paul Railway Company, two several railroads engaged in the operation of one or more of the tracks which cross 11th street beneath the viaduct in controversy, from the burden of the cost of the repair of said viaduct.

31. The court erred in granting the writ herein for the reason as stated in respondent's answer—the officers of this respondent who have power to obey the commands of such writ are beyond the jurisdiction of this court.

32. The court erred in not deciding that the apportionment of one-third of cost of repairing viaduct to this respondent was inequitable, unjust, and arbitrary, and, further, in not deciding that the action of the city council in making such apportionment was subject to review in this proceeding.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By C. J. GREENE, *Its Attorney.*

Afterward, at the February term of said court and on the 1st day of May, 1895, said motion for new trial was overruled herein as follows, to wit:

Motion for New Trial Overruled.

STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator, *vs.* CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.	Order Overruling Motion for New Trial.

On this day the motion for a new trial filed herein by said respondent came on to be heard and was argued by counsel, and, the court being fully advised in the premises, it is considered, ordered, and adjudged that said motion be, and the same is hereby, overruled; to the overruling of which said motion the said respondent

duly excepts. The respondent given 40 days from rising of
63 court to prepare and serve bill of exceptions.

G. W. AMBROSE, *Judge.*

May 1, 1895.

Afterward, on the 1st day of May, 1895, a peremptory writ of mandamus was issued herein as follows, to wit:

Peremptory Writ of Mandamus.

STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator, *vs.* CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.	Order Allowing Peremptory Writ.

On this day this cause came on to be heard upon the petition and application for mandamus of said relator filed herein and upon the alternative writ of mandamus heretofore issued, and the answer and return thereto as made and filed herein by said respondent, and the evidence, and was duly argued by counsel and submitted to the court; on consideration whereof the court finds the issues in favor of the said relator, and that said relator is entitled to a peremptory writ of mandamus, as in its said petition and application prayed.

It is therefore considered, ordered, and adjudged by the court that a peremptory writ of mandamus issue against the Chicago, Burlington & Quincy Railroad Company, commanding and requiring said Chicago, Burlington & Quincy Railroad Company to repair that portion of the Eleventh-street viaduct in the city of Omaha, Douglas county, State of Nebraska, commencing at the south end of said viaduct and extending northward a distance of one-third the entire length of said viaduct, the said repairs to be made in accord-
ance with the requirements of ordinance No. 3752, duly
64 passed by the city council of said city January 30, 1894, and approved by the mayor of said city February 2, 1894, and in accordance with the plans and specifications prepared and submitted by the city engineer and board of public works of said city, approved by the mayor of said city February 2, 1894, the said repairs to be commenced immediately and carried forward without unnecessary delay.

It is further considered, ordered, and adjudged that the said Chicago, Burlington & Quincy Railroad Company pay the costs of this action, taxed at $—.

G. W. AMBROSE, *Judge.*

Afterward, on said 1st day of May, 1895, a stipulation was filed herein as follows, to wit:

Stipulation.

In the District Court, Douglas County, State of Nebraska.

STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.
} Stipulation.

It is hereby stipulated and agreed by and between the parties above named that the said respondent shall, without unnecessary delay, cause to be prepared and settled a bill of exceptions herein, and immediately thereafter file the same with a petition in error in the supreme court of the State of Nebraska, and secure without unnecessary delay an early and speedy hearing in said supreme court of said cause, to which the relator will make no objection and will favor, and until such hearing and the final determination of said supreme court the issuance of the peremptory writ of mandamus allowed herein shall be delayed.

W. J. CONNELL,
Att'y for Relator.
C. J. GREENE,
Attorney for Respondent.

65 Afterward, on the 8th day of May, 1895, a certified copy of said peremptory writ of mandamus was returned, with the sheriff's return thereon, and filed herein as follows, to wit:

Sh'ff's Return on Copy of Peremptory Writ of Mandamus.

STATE OF NEBRASKA, } *ss:*
Douglas County, }

Received this writ on the 4th day of May, 1895, and served same on the 6 day of May, 1895, on the within-named Chicago, Burlington & Quincy Railroad Company by delivering to George W. Holdrege, the managing agent of said corporation, personally, in Douglas county, Nebraska, a true and duly certified copy thereof, with all the endorsements thereon, the president or other chief officer of said corporation not being found in Douglas county.

JOHN C. DREXEL, *Sheriff,*
By H. ROSENZWIG, *Deputy.*

Fees ..... .75
Mil. ..... .10
.85

Certificate.

STATE OF NEBRASKA, } ss:
Douglas County, }

I, Frank E. Moores, clerk of the district court in and for Douglas county, Nebraska, do hereby certify that the foregoing is a true transcript of the proceedings in the case of State of Nebraska *ex rel.* The City of Omaha, relator, against Chicago, Burlington & Quincy Railroad Company, respondent, appearing of record in said court. I do further certify that the bill of exceptions hereto attached and made a part of this transcript is the original bill of exceptions filed in the office of the clerk of said court in the above-entitled action.

66 Witness my signature and the seal of said court, at the city of Omaha, this 11th day of June, A. D. 1895.

[SEAL.] FRANK E. MOORES, *Clerk.*

Green & Breckenridge, attorneys for respondent, have paid $23.65 for this transcript.

[SEAL.] FRANK E. MOORES, *Clerk.*

(Endorsed:) 7805. C., B. & Q. R. Co. *v.* State *ex rel.* Omaha. Transcript. Supreme court of Nebraska. Filed Jun- 12, 1895. D. A. Campbell, clerk.

67 48, # 349.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator,
vs.
THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.
} Bill of Exceptions.

Filed Jun- 5, 1895.

FRANK E. MOORES, *Clerk.*

* * * * * * *

68 Received from Hon. C. J. Greene and Hon. Charles F. Manderson, for examination and amendment, a draft of a bill of exceptions in the case of The State of Nebraska *ex rel.* The City of Omaha, relator, *vs.* The Chicago, Burlington & Quincy Railroad Company, respondent, tried in the district court of Douglas county, Nebraska, at the regular February term thereof, A. D. 1895. Dated ——.

—— ——,
Attorney for Relator.

I herewith return the draft of bill of exceptions in the above-entitlsd cause and propose the following amendments thereto. Dated ——.

—— ——,
Attorney for Relator.

69 It is hereby stipulated and agreed by and between the parties hereto, relator and respondent, that the following is a true and complete copy of all the evidence, oral and documentary, introduced upon the trial of the within-entitled cause, together with all objections and exceptions thereto and rulings of the court thereon.

W. J. CONNELL,
Attorney for Relator.

Dated June 4th.

CHAS. J. GREENE,
CHAS. F. MANDERSON,
Attorneys for Respondent.

The within contains all the evidence offered or given by both parties upon the trial of this case, and on application of the respondent herein this bill of exceptions is allowed by me and ordered to be made a part of the record in this case.

G. W. AMBROSE, *Judge.*

Dated 6, 4, '95.

70 Be it remembered that in the district court within and for the county of Douglas, State of Nebraska, at the regular February term of said court, in the equity division thereof, to wit, on the 10th day of April, 1895, before the Honorable G. W. Ambrose, one of the judges of said court; Hon. W. J. Connell appearing for the relator, and Hon. C. J. Greene and Hon. Charles F. Manderson appearing for the respondent, the following proceedings were had, viz:

It is stipulated and agreed that the allegations in paragraph 2 of the petition are true and correct.

By Mr. CONNELL: I now offer in evidence the original resolution referred to in the petition, of which a copy is attached, marked "Exhibit A," directing the committee on viaducts and railroads and the city engineer to examine the roadway and road-bed of the Eleventh-street viaduct, and report to the council regarding the necessity for repaving the same.

Objected to as immaterial and irrelevant. Objection overruled. Copy hereto attached. Respondent excepts.

By Mr. CONNELL: We offer in evidence the report of the committee on viaducts and railways, the original report, of which a copy is attached to the petition, marked "Exhibit B."

Objected to as immaterial and irrelevant. Objection overruled. Copy hereto attached. Respondent excepts.

71 Counsel for relator offers in evidence another report of the committee on viaducts and railways, dated September 2, 1892 (offering the original), of which a copy is attached to the petition, marked "Exhibit C."

Objected to as immaterial and irrelevant. Objection overruled. Respondent excepts.

Counsel for relator offers in evidence original ordinance No. 3734, of which a copy is attached to the petition, marked "Exhibit D."

Objected to as immaterial and irrelevant. Objection overruled. Respondent excepts. Copy hereto attached.

Counsel for relator offers in evidence the original plan of repairs submitted by the city engineer to the board of public works, of which a blue-print copy is attached hereto, marked "Exhibit E."

Objected to as immaterial and irrelevant. Objection overruled. Respondent excepts.

Counsel for relator offers in evidence the original ordinance No. 3752, of which a copy is attached to the petition, marked "Exhibit F," the ordinance approving the plans.

Objected to as immaterial and irrelevant. Objection overruled. Respondent excepts. Copy hereto attached.

72 ANDREW ROSEWATER, sworn on behalf of the relator, examined in chief by Mr. Connell, testified as follows:

Q. State your name.

A. Andrew Rosewater.

Q. What official position, if any, do you hold in the city of Omaha?

A. City engineer.

Q. How long have you been the city engineer of the city of Omaha?

A. Thirteen years or more.

Q. During what periods of time?

—. I was city engineer in 1870, 1872, 1873, 1874. I was city engineer in 1881, 1882, 1883, 1884, 1885, 1886, and a part of 1887, and I have been city engineer during the years 1892, 1893, 1894, and this year.

Q. Are you familiar with the structure in this city known as the Eleventh-street viaduct?

A. Yes, sir.

Q. Are you familiar with Eleventh street, along which that viaduct is constructed?

A. I am.

Q. How long has that existed as a public street and a traveled thoroughfare in the locality of the viaduct?

A. That street has been dedicated to the public and opened as a street ever since the original filing of the city plat, in 1857, I believe.

Q. And prior to the construction of this viaduct what was the fact as to its being a traveled thoroughfare along that portion where the viaduct has been since constructed and in that vicinity?

73 A. It was one of the thoroughfares of the city going to the south end of the town.

Q. Do you know when that viaduct was constructed, Mr. Rosewater?

A. Yes, sir.

Q. When?

A. The viaduct was begun in 1886 and completed some time in 1887.

Q. When did you say it was completed?

A. It was completed some time in 1887.

By Mr. GREEN:

Q. Just before we became a city of the metropolitan class?

A. I think the legislation took place in the spring of 1887.

Q. And went into operation——

A. And went into operation from that time on. The viaduct was under construction during that period, but was not finished at the time of this metropolitan act.

By Mr. CONNELL:

Q. I will ask the question, Mr. Rosewater, by whom it was constructed, if you know.

A. It was constructed under a contract with the city by the Morse Bridge Company. You want to know under what arrangement it was constructed. Under a compact with the city of Omaha, the Burlington and the Union Pacific Railway Companies.

Q. Do you know by what railway companies?

Objected to as wholly irrelevant, incompetent, and immaterial.

By the COURT: The contract will show for itself.

By Mr. CONNELL:

Q. Do you know whether it was constructed over and across any railroad tracks of this defendant, The Chicago, Burlington & Quincy Railroad Company?

74 A. Yes, sir; it was.

Q. Do you know to what extent the track was ever used by that company?

A. It was the line of their main track going to Lincoln and Plattsmouth. In fact it was over the tracks that led to the west from Omaha and south.

Q. It would hardly be Plattsmouth?

A. Well, they started the other way——

Q. Do you know whether it was the through line of that company to Denver and other western points?

A. Yes, sir; it was their line to Denver, and it is their present line.

Q. State whether it is the track used by this company for its general through trains to Denver, California, and Hot Springs and other western and northwestern points.

A. Yes, sir; it is the track.

Q. Do you know of the proceedings had and taken by the city, through its council and mayor and committee, with reference to having certain repairs made on the viaduct?

A. I know.

Q. What was the condition of this viaduct immediately preceding such proceedings?

A. The viaduct was in a dangerous condition for general traffic. The timbers upon which the superficial structure rested—that is, upon which the tracks and pavement rested—were in a very decayed condition and liable to break at any time and precipitate any wagon or cars that were traveling over it down below.

Q. And what was the character of the roadway and the sidewalks as well, for pedestrians?

75 A. Well, they all rested on these same timbers, and they would have to be reconstructed or repaired in order to make them safe.

Q. What was the character of the covering and surface—for instance, the boards or planks, whatever they were—along the traveled portion for pedestrians?

A. They were not in a very good condition, although they were better than the substructure.

Q. They were in such condition as to make them need repairing?

A. They would—as soon as you took up the substructure the whole thing would have to go to pieces.

Q. What was the condition of the roadway used by teams?

A. Very dangerous.

Q. Was that viaduct closed to general travel, do you know?

A. Yes, sir; it was closed. I took the responsibility myself of having it closed and then notifying the council; then they ordered it, I believe, closed formally.

Q. Do you know whether it is wholly closed now and disused for traffic, both by teams and street cars?

A. It is closed to all traffic now.

Q. How was it closed—that is, as to physical action, by barring out traffic?

A. I think that the board of public works had some plank put across the ends of it, and a notice that the bridge was unsafe for travel stuck up there.

Q. Do you know when that was done?

A. Well, this was done last fall, I believe. I wrote a notice to the council calling their attention to the unsafe condition for even street-car traffic, which had been kept on for some time after the other traffic had been discontinued. In view of the arrangement

76 of the sill on one end of it, I considered it unsafe for street-car traffic. Their tracks going over the girders, they would be safer than wagons, where the wheels went between, and which would be precipitated below, whereas the girders was safer under the rails.

Q. When was it closed to traffic by teams—before or after the abandoning or closing of it to street cars?

A. Long before.

By Mr. GREEN: There is no controversy in regard to this here—both the answer and petition admit all that.

By Mr. CONNELL:

Q. What was the character of the covering for the purpose of wagon traffic?

A. They were plank.

Q. And what was the character of the covering along the portion assigned to pedestrians?

A. It was also plank.

Q. Where did the viaduct commence and end, or, rather, between what points did it exist?

A. You have a plat there. I can give you the exact location from that.

Q. (Handing witness plat.)

A. It substantially goes from Jackson to Mason street—that is, between the approaches. The extreme ends front on Jackson and Mason streets.

Q. That would extend a distance of about four blocks, would it?

A. Yes; four blocks exactly.

77 Q. And over what tracks—what railroad tracks would it cross?

A. It is over the tracks of the Burlington and Union Pacific Railroad Companies.

Q. Was there anything in the way of the reasonable grade crossing except the construction of railroad tracks across Eleventh street?

A. There was none. There was no crossings except directly over the tracks.

Q. As to whether the contour of ground or country in that locality was such that a grade crossing would be practicable and desirable without the use of the viaduct, but for the railroad tracks?

A. A grade crossing is a crossing on the grade of the tracks. That crossing existed at the time the viaduct was built, and was built because it was dangerous to cross on grade.

Q. Dangerous for what reason?

A. The constant moving of trains.

Q. Along the tracks?

A. Yes, sir.

Q. And without the tracks and the moving of these trains was there anything to necessitate the construction of a bridge or viaduct in that locality on that street?

By the COURT: Isn't that all concluded in the contract?

By Mr. GREEN: We don't make any controversy about that; we admit that.

The WITNESS: If there were no railroad tracks there, there would be no occasion to build a viaduct for public travel.

78 Q. The viaduct, then, isn't constructed by reason of the extreme grade?

A. No, sir.

Q. Do you know whether these repairs have been made by the railroad company or does the viaduct still remain in this dangerous condition?

A. There have been no repairs whatever since the time of the first closing of the viaduct.

Q. What do you know, if anything, of this particular company being informed or notified of the proceedings? Did you ever have any talk with Mr. Holdrege regarding it?

A. I went over the line of both the Sixteenth-street and the Eleventh-street viaduct with the chief engineers of the Union Pacific and Burlington roads, and examined those viaducts to see what, if anything, could be done or whether they were in a dangerous condition. There was no disagreement as to their being in a dangerous condition. The Sixteenth-street viaduct was first considered, and an agreement was reached as to that and repairs made. The other was not done.

Q. An agreement was reached with whom?

Objected to as incompetent, irrelevant, and immaterial. Question withdrawn.

Q. Which end of the viaduct crosses the track of the defendant in this case, The Chicago, Burlington & Quincy Railway Company?

A. The south half of the viaduct is over their track.

Q. What is the extent of what are termed the approaches to that viaduct?

A. I haven't the exact figures, but they would approximate somewhere nearly one-half of the viaduct.

79 Q. Have you a plat from which you can refresh your recollection with reference to that?

A. I think I can approximate it.

Q. If that is approximately correct your answer will do.

A. Well, I would have to scale it to get it exactly; then it would not be obtained absolutely.

Q. The approaches would approximate about one-half?

A. Yes, sir; the two approaches would approximate nearly one-half the entire length. Afterwards you reach a point which gives you nearly twenty feet clear headway over the tracks in each case before you strike the viaduct proper.

Q. Is that the necessity for the construction of the approaches?

A. You can't reach a point twenty feet above the tracks without having a construction from the beginning—a gradual approach from zero to an elevation of twenty feet above the tracks.

Q. That would be true if this track alone was to be crossed?

A. It would be true on the south end; yes; and largely on the north end. You would have to go twenty feet above the tracks before you get over the thoroughfare.

Q. Can you state approximately about what the entire length of the structure is, including the approaches?

A. About fifteen hundred feet.

Q. Then approximately about seven hundred and fifty feet would be for approaches?

A. Yes, sir; somewhere about that.

Q. Do you know whether or not this plan to which the blue-print copy is attached is the one that was prepared for making these repairs by yourself and the board of public works of the city?

80 A. Yes, sir; that plan was prepared and a copy submitted to the railway companies—each of the companies.

Q. Was there any objection ever made to it so far as the engineering part of it was concerned?

A. No question was raised by the company through their officials in any way with reference to the plans.

Q. Or as to what was required to be done with the plans?

By Mr. GREEN: Objected to as wholly immaterial. The company has objected to repair it under any plan.

A. That I understand, but they have no objection to the particular plans.

Q. They simply objected to the whole business.

A. Yes; that is true. The objection that was raised was simply an objection to the right of the city to exact of the companies to proceed with the construction or repairing at all.

By Mr. CONNELL:

Q. At which end of the viaduct, Mr. Rosewater, is the business or central portion of the city?

A. It is on the north end of the viaduct.

Q. To what extent is the country south of the south end of the viaduct inhabited and occupied?

A. O, it is inhabited and occupied for two miles at least south from that viaduct.

Q. Is Eleventh street what you would call a built-up street largely?

A. To a considerable extent. There are a large number of residents south of that viaduct.

81 Q. Do you know whether there is a great deal of business——

Objected to as immaterial.

Q. What is the character of the buildings immediately south of the viaduct, on the south side, and for what purposes are they used?

Objected to as immaterial. Objection sustained.

Q. What in your judgment as an engineer, and being familiar with the structure and the occupancy, as to whether the construction of one-third by this defendant or the repairing of one-third would be a reasonable proportion?

Objected to as incompetent, irrelevant, and immaterial. Objection sustained. Relator excepts.

Q. Now, these repairs that were proposed by the board of public works and yourself as city engineer—what was the fact as to whether they were necessary for the purpose of putting that viaduct in safe condition for travel?

Objected to as incompetent. Objection overruled. Respondent excepts.

A. Yes; I think they were necessary.

By Mr. GREEN: The point I make on it is that there is no law giving this board or city any authority to estimate what the damage would be or what the cost ought to be; but that question I can argue later on. Let this go in, subject to objection.

By Mr. CONNELL:

Q. I wish to ask you, Mr. Rosewater, the general character of these defects that exist, which made the repairs necessary; whether they were the result of failure to make ordinary repairs or whether, by reason of the time that had elapsed and the traffic over the viaduct, the parts had become weakened and rotted out or demoralized in any other way. State the facts with respect to that.

82 Objected to as incompetent, irrelevant, and immaterial. There is no controversy or no issue made in regard to that question in the pleadings. Objection overruled. Respondent excepts.

A. The reason for the city's action in this matter was owing to the general decay of the substructure under the plank—which supported the plank. It was in such a decayed condition it was dangerous to allow traffic over it any longer. It might break through at any time.

Q. Then what is the fact with reference to the covering? I refer now to the plank on the top.

Objected to as having been gone into fully. Objection sustained.

By the COURT: Does this decayed condition apply to the whole viaduct?

A. The entire viaduct.

Q. The entire length?

A. That is, but the masonry approaches. Under the masonry approaches there was no substructure. They was held with earth and supported the viaduct direct. The driveway——

Cross-examination.

By Mr. GREEN:

Q. You say these tracks are owned by the Union Pacific and Burlington Companies?

A. Yes, sir.

Q. Do you know what relation or what right the Rock Island has on these tracks?

A. I only know from general publications, that is all.

83 Q. Isn't it true that the Rock Island is operating its through trains there over it?

A. It is so reported.

Q. You know they do run trains through there?

A. Yes, sir.

Q. Isn't it so with the Milwaukee?

A. I understand they do.

Q. Isn't it also true, as a matter of general information, that they acquired an ownership to use all these tracks——

By Mr. CONNELL: I am willing to agree that, under lease with the Union Pacific, those roads are operating their trains over the tracks of the Union Pacific railroad.

By Mr. GREEN: Under a lease of nine hundred and ninety-nine years.

By Mr. CONNELL: I think that is so, too.

By the COURT: Let that fact stand admitted.

By Mr. CONNELL: I wish you would add, Which lease is in litigation and the case is now pending in the Supreme Court of the United States.

By Mr. GREEN: Having been decided both by the circuit court and the court of appeals in favor of the lease.

Q. Mr. Rosewater, what is the general topography of the land under this viaduct or between Jackson and Mason streets?

A. The ground between Jackson and Mason streets is both hollow and on an incline—that is, the traffic originally under
84 that before the viaduct was constructed went down grade to Jones or between Jones and Leavenworth and then raised up gradually towards the south.

Q. Was it a very abrupt raise after you left the Union Pacific tracks to Mason street?

A. I don't remember the exact grade; it was quite an incline.

Q. The right of way of the Union Pacific, was that right on the side of the bluff?

A. The bluff back of that ground has been cut away and streets cut down.

Q. And the approach of this viaduct is on the north side, is it not?

A. There are two approaches to this viaduct, one on the north and one on the south.

Q. How long is the approach on the south?

A. The south approach would be about three hundred feet, I would say, while the other end is perhaps between four and five hundred feet. The south end might be said to be about three hundred feet long, and the north approach is between four and five hundred feet long.

Q. Before the construction of this viaduct the tracks of the Burlington Company were close to the embankment?

A. Yes, sir; they were built on higher ground considerably than the Union Pacific.

Q. And on the north side of the tracks there is a depression, and then a rise, first a depression and a rise, to Jackson street, is there not?

A. On the north side of the Burlington tracks?

85 Q. On the north side of the Union Pacific.

A. On the north side of the Union Pacific tracks there was a gradual fall towards Jones street *is*, I believe, where the lowest point of drainage is; then there is a rise towards the south.

Q. All of this street under the viaduct north of the Union Pacific right of way is not maintained and occupied by the city, but is practically abandoned for street purposes?

A. It has not been used except on the cross-streets.

Q. So that the viaduct takes place of the street below?

A. Yes, sir.

Q. Even off the right of way?

A. That is partly and mainly so.

Redirect examination.

By Mr. CONNELL:

Q. Is not a portion of Eleventh street under the viaduct paved and used for travel down at least to a point where the railroads cross?

A. I think it was paved before the viaduct was built; that street was paved before the viaduct was built.

Q. And is it still used at the sides?

A. Slightly on the sides for local traffic.

Q. What is the width of Eleventh street at that point?

A. The full width of Eleventh street is one hundred feet, including sidewalks.

Q. What is the width of this viaduct?

A. The roadway is twenty feet, and then I believe there are six-foot sidewalks on each side.

Q. Is it constructed about in the center of the street?

A. Yes, sir.

86 Q. What is the width of the substructure where it rests upon or touches the street?

A. It is about twenty feet.

By Mr. CONNELL: It is admitted that due notice was given the defendant of these proceedings by delivering copies to the general manager.

By Mr. GREEN: I will object to that as incompetent and immaterial.

By Mr. CONNELL: That will be all right.

By Mr. GREEN: It is admitted that there has been a demand made on the company, through its general manager, and a refusal to make the repairs required in the ordinances, which have been served.

By Mr. GREEN: Respondent offers in evidence the originals of the several copies of the contracts and ordinances attached to its answer; also the ordinance (729) under which the line crossing Eleventh street was built.

Received. Contract and ordinance marked in this record for identification "Exhibits 2, 3, 4, and 5," and copies are hereto attached.

HENRY BOLLN, sworn on behalf of the relator, examined in chief by Mr. Connell, testified as follows:

Q. What official position do you hold in the city of Omaha?
A. City treasurer.
Q. How long have you been city treasurer this last term?
A. For the last three years.
87 Q. During that time have you been and are you still generally familiar with the financial condition of the city and the funds of the city?
A. Yes, sir.
Q. State whether or not there is any fund or has been during that time any fund of the city for the purpose of either constructing or making repairs to viaducts.
A. No, sir; there has not been any fund.

Objected to as incompetent and immaterial. Received subject to objection.

Q. There has been no fund that could be used lawfully for that purpose?
A. No, sir.

By Mr. CONNELL: I offer in evidence the original consent of Mr. Holdrege, as the general manager of the Omaha & Southwestern, and Mr. Kimball, as the general manager of the Union Pacific Railway Company, to the Omaha Motor Railway Company, granting the rights and privileges covered by ordinance No. 2017, marked "Exhibit 1."

Objected to as irrelevant and immaterial. Objection overruled. Respondent excepts. Copy hereto attached.

Relator rests.

By Mr. CONNELL: We admit the allegations of paragraph 11 of the defendant's answer for the purpose of this case only.

I am willing to admit the fifteenth paragraph of the defendant's answer, except that the Tenth-street viaduct is more convenient for the use of the public and will be used by the public in place
88 of the Eleventh-street, which I deny.

We admit all of paragraph 18, except the last portion of the paragraph, which relates to the danger incident to Eleventh street, and following that reference.

We admit paragraph 19.

It is admitted that the Omaha & Southwestern was incorporated in 1869 under the laws of Nebraska providing for incorporation of railroad companies, and built its line across 11th street in 1884.

By Mr. GREEN: I offer ordinance No. 729 in evidence, the ordinance under which the city gave the road the right to cross Eleventh street (Exhibit 5).

Received. Copy hereto attached.

G. W. HOLDREGE, sworn on behalf of the respondent, examined in chief by Mr. Green, testified as follows:

Q. You are the general manager of the defendant, The Chicago, Burlington & Quincy Railroad Company?
A. Yes, sir.
Q. Where does your jurisdiction lie?
A. Over the lines of the Burlington Company west of the Missouri river.
Q. What power or authority have you with respect to ordering the building of a viaduct such as is on Eleventh street, or the viaduct in dispute?

Objected to as incompetent, calling for a conclusion of the witness, and not the best evidence. Objection sustained. Respondent excepts.

89 Q. What are your duties with respect to the construction of viaducts?
A. You are referring to viaducts similar to that on Eleventh street?
Q. Yes, sir; Eleventh street.
A. I have no authority to erect an unusual structure of that kind and never had, and no officer of the company has. Authority of that kind would have to be obtained from the directors, as far as our arrangements are concerned.
Q. To what extent could you act in the premises?
A. I could look into the question and refer it to the president, who would take it to the board of directors.
Q. Has the board of directors in any way authorized you to expend any money or given any orders to you in regard to this viaduct?
A. No, sir; they never have.
Q. What instructions, if any, have you received in regard to repairing viaducts of this kind or the repairs required in this case?
A. I have received no instructions relative to this question.
Q. What authority have you to go on and make these repairs?

Objected to as immaterial, irrelevant, and incompetent, calling for a conclusion of the witness, and not the best evidence.

By the COURT: Give me the facts in relation to it.
A. The fact is I haven't the authority to spend money for the repair of the Eleventh-street viaduct.

By Mr. GREEN:

Q. Where you are required to spend a large amount of money, in expending twelve or thirteen thousand dollars, what is the usual proceeding with the company?

90 Objected to as incompetent, irrelevant, and immaterial.

Q. What is required to be obtained in order to authorize you to spend that amount of money?

By the COURT: I will hear the proof.

Relator excepts.

A. It would depend on the nature of the expenditure. As far as ordinary routine repairs are concerned, which, beyond any question, are necessary for the operation of the road, I would have authority to go on and do the work, but as far as an unusual expenditure is concerned, as this would be, I would not have the authority to do it.

Q. Supposing an order of this court would issue direct to you directing you personally to repair this viaduct, what would you have to do in order to comply with the request; what could you do by yourself in your official capacity?

Objected to as incompetent, irrelevant, and immaterial, calling for a conclusion of the witness, and not the best evidence. Objection overruled. Relator excepts.

Q. I ask you, supposing on order issued out of this court to you personally directing you to procure the repair of this viaduct, what could you do and what procedure would be necessary; what authority would you have?

Objected to as incompetent, irrelevant, and immaterial and not the best evidence. Objection overruled. Relator excepts.

A. The facts would have to be referred to our board of directors and instructions obtained from them before we could expend money in that way.

91 Q. You are acquainted with this viaduct, are you not?

A. Yes, sir.

Q. State to the court what its condition is now and how it came about.

A. The Eleventh-street viaduct is an iron or iron and steel structure, with a wooden floor. All the heavy floor beams are iron or iron and steel. The wooden floor necessarily gives out, different parts of it, at periods that might run from three to ten years, and, through neglect in repairing the wooden parts of the viaduct, it has become unsafe for use.

Q. At the time the viaduct was constructed was it contemplated by the parties that the floor would be required to be renewed once in so often?

Objected to as incompetent, irrelevant, and immaterial, not the best evidence, and calling for the conclusion of the witness. Objection overruled. Relator excepts.

A. A structure of that kind necessarily gives out, as far as the wooden parts of it are concerned, at frequent periods, and can only be kept in repair by constantly renewing the parts that give out.

Q. What is the fact about the city making repairs on this viaduct after it was first constructed?

Objected to as incompetent, irrelevant, and immaterial and call-

ing for a conclusion of the witness. Objection overruled. Relator excepts.

A. All the repairs thus far have been made by the city, and they have been made from time to time up to quite a recent date, up to the time it was closed.

Q. Has the railroad ever made any repairs there?

92 A. The railroad has not made any repairs there.

Q. How many tracks are there under this viaduct?

A. The Burlington occupies one track under the viaduct and the other railroads, the Rock Island, Milwaukee, and Union Pacific occupy twenty-one tracks.

Q. When was this lease made between the Union Pacific and the Rock Island and Milwaukee roads; about when?

A. I haven't the exact date, but it is subsequent to the construction of the viaduct, several years ago.

Q. Now, how much use relatively does the Rock Island make of those tracks as compared to the use made by your road of your track?

A. I think they use it very considerably more, for the reason that their freight business passing in and out of Nebraska passes over the tracks, as well as the passenger business. Our freight business, except that that pertains to Omaha, passes over the Platte River line, and the Rock Island freight business, going to and from the local station, the local freight station, must necessarily pass under this viaduct.

Q. What use is made of these tracks by the Union Pacific Company as compared with the use made by the Burlington?

A. They operate twenty-one tracks where we operate one, showing that there must be a much larger volumn of business pass under it and a good deal more going on, and it is used partially as a yard, requiring a number of engines and cars to pass under the viaduct, or a large number compared with ours; I should think more in proportion to the tracks, probably.

Q. How about the Milwaukee?

93 A. The Milwaukee operates the line for their South Omaha and all their Omaha business necessarily passes under, or practically all of it, for the reason that the Union Pacific side tracks, upon which the Milwaukee business is done, diverge from the main line above the viaduct; all the tracks reaching to the bottoms diverge above the viaduct.

Q. What is the fact in regard to the traffic of the Union Pacific and the handling of its trains, not only in and out of the station, but on the bottom to their shops? Does that pass and repass?

A. Business going to and from their shops and all the freight tracks and warehouses, including their freight station, must pass under the viaduct on the other tracks and on their main line. Business to and from the bridge pass- under the Eleventh-street viaduct.

Q. Where is all your eastern freight business transacted?

A. The business in and out of Omaha, as far as our local freight

station is concerned, which is a very considerable part of it, is in the bottom and does not pass under the viaduct. Our only business under the viaduct is for stations going in and out of Omaha, going west, and our freight trains from our Omaha station west and from the west to our Omaha station pertaining to Omaha business.

Q. Do you remember the contract made with the city by which your road was to contribute a certain portion of the cost of the Eleventh-street and Sixteenth-street viaducts?

A. Yes, sir.

Q. State whether the provisions of that contract have been carried out as far as the railway company is concerned.

A. Yes, sir; we have carried out the provisions of the contract on our side.

94 Q. State to the court what practical use, what substantial use, a viaduct is to the railway company in the operation of its trains on the track under it.

A. As far as our road is concerned, with one line, it is not a necessity.

Q. How is it taking all the roads together?

A. It is some convenience having the wagon track overhead.

Q. How is it with reference to all the railroads under it?

A. It is a convenience to them to have the traffic overhead. It makes less risk of accident.

Q. You had charge, I believe, of the construction of this line to South Omaha, across Eleventh street?

A. Yes, sir.

Q. Do you remember the ordinance under which it was constructed?

A. That the right of way was granted through the city, do you mean?

Q. Yes, sir.

A. I remember that we obtained an ordinance from the city wherever we crossed streets or run through streets about that time.

Q. Calling your attention to this provision of it, I will ask you if it has been complied with (referring to a book)?

Objected to as leading, immaterial, irrelevant, and calling for the conclusion of the witness.

Q. State how the line was constructed with reference to the crossings.

A. It was constructed across streets under an arrangement that we made with the city authorities, either at street grades or proper height above street grades.

95 Q. In constructing the road, did you comply with the terms of the contract between the road and the city, so far as you were to construct it, as required by the city?

Objected to as leading, incompetent, irrelevant, immaterial, and calling for a conclusion of the witness.

By the COURT:

Q. What did you do in relation to the construction of this road,

as to the construction of tracks, in accordance with the grades of the streets?

A. The tracks were made to conform with the grades of the streets, except in cases where it passed a sufficient elevation over the street to make the street entirely passable under, and in all cases under an arrangement made with the city authorities and in conformity with the contract made with the city.

By Mr. GREENE:

Q. What kind of a crossing was this at Eleventh street?

A. An overcrossing.

Q. What you call a surface crossing at grade?

A. It was an overcrossing there after the construction of the Eleventh-street viaduct.

Q. But before that, when you were building the line, when the line was first built?

A. There was no viaduct there, and it was made to conform to the grade of the street.

Cross-examination.

By Mr. CONNELL:

Q. What you mean by making the crossing conform to the streets, you mean conform to the then surface of the street?

96 A. We have to, in cases of that kind, ascertain the grade from the city authorities and put the tracks at such grade as they will designate to be the proper grade for the street.

Q. Don't you know, Mr. Holdrege, in this particular case that your track is located considerably below the established grade of the street if the street was worked to the established grade and no viaduct existed?

A. I don't know about any grade that may have been established on paper. I know about the established grade as it existed and as we were authorized by the city to lay the track by the city authorities.

Q. When you refer to the grade you refer to the surface of the ground rather than the grade established on paper?

A. I refer to the grade that was agreed on between the city authorities and railroads as the proper grade to conform with the street.

Q. The city engineer didn't lay out your line of road and fix the elevation of tracks, did he?

A. No; but we ascertained before making the location of the road what the grade of the different streets was, and we so located our road to conform to the arrangements made between the city and the roads as the proper grade.

Q. You don't pretend to know where the established grade—that is, the grade on paper—of this street was, do you?

A. No, sir; I don't know whether that differs from the grade that was designated to us by the city or not.

Q. You refer to the number of tracks other than the tracks

owned by your company. Those are all to the north of your track, Mr. Holdrege?

97 A. Yes, sir.

Q. They are all Union Pacific Railroad tracks, are they not?

A. I understand that the title is in the Union Pacific, but that they are operated under a joint lease with the two other companies mentioned, which would be equivalent to a joint ownership. It is a lease running for nine hundred and ninety-nine years.

Q. But the tracks are located on the railroad right of way, on the Union Pacific Railroad right of way, are they not?

A. They are operated by the Milwaukee and Rock Island—they are operated by all three companies, as I understand it.

Q. Three companies jointly?

A. Yes, sir.

Q. In other words, the Rock Island and Milwaukee run over the tracks that are used by the Union Pacific?

A. The arrangement——

Q. Answer that question. They run on the same tracks?

A. They all three run over the same tracks.

Q. And those tracks are tracks that were laid by the Union Pacific?

A. Yes, sir.

Q. They were constructed by the Union Pacific and on the Union Pacific right of way?

A. Or in city streets.

Q. Or cross city streets?

A. Yes, sir.

Q. They have just about as many tracks on Tenth street east of there as they have on Eleventh street, haven't they?

A. Yes, sir.

98 Q. And you have the same number on Tenth street as on Eleventh?

A. I think on Tenth we have, at the present time, two, and we have only one on Eleventh.

Q. What were the number of tracks owned and operated by the Union Pacific when this viaduct was constructed?

A. Substantially the same as at present.

Q. About twenty-one?

A. There may have been a few laid since.

Q. Substantially the same number?

A. There cannot be very much difference.

Q. Your company and the Union Pacific together not only aided in the construction of the Eleventh-street viaduct under the contract with the city, but the same two companies constructed the Tenth-street viaduct, didn't they?

A. No, sir; they didn't either one of them construct the Tenth-street viaduct?

Q. Who constructed that?

A. The Omaha Union Depot & Railroad Company constructed it.

Q. The Omaha Union Depot & Railroad Company is made up of the Union Pacific and this company, is it not?

Objected to as not proper cross-examination. Objection sustained.

Q. I would like to have the gentleman to state if it is a fact that no claim is made in this case that the defendant here is required to construct an undue proportion, if it is required to construct any.

By the COURT: I have so understood it.

99 By Mr. GREENE: I want to say now whenever I get into that case I don't think the Burlington ought to pay one-third of the construction and maintenance of any viaduct where there are two or three other railroads with twenty or twenty-one tracks under the same; that the question of proportion might yet come up in this case if all the other questions were decided in favor of the city.

By the COURT: Under that statement I will withdraw my ruling and allow you to make the proof.

By Mr. CONNELL:

Q. The Omaha Union Depot & Railroad Company is made up of the Union Pacific and this road, is it not?

By Mr. GREENE: Objected to. The Union Depot Company is a corporation organized under the laws of the State of Nebraska, and the stock made up, owned, and distributed between the companies. It is not the best proof. If they want to know what the respective contributions of the railroads were, perhaps the subscription book as to the stock might show. If the Burlington road owns one-third of the stock it would pay one-third of the assessment of stock into the Union Depot Company. The Union Depot Company built it itself.

Objection overruled. Respondent excepts.

The WITNESS: If you will allow me to ignore that question, I could explain.

By the COURT: Give the facts in relation to that.

100 A. The depot company cannot be said to be made up exactly of the Union Pacific and Burlington Companies. The Eleventh-street and Tenth-street viaducts are built under a different arrangement entirely, and the proportionate expense in one case would have nothing whatever to do with the other, for the reason that the Tenth-street viaduct was built by the Omaha Union Depot & Railway Company, and that Union Depot and Railway Company proposed to put up a large depot building and own and operate it jointly, and to rent tracks and accommodations to other railroads, and to obtain the money for this construction largely on the sale of bonds of the Omaha Union Depot & Railway Company. So the proportion that the Burlington would take of that stock, whether it would be one-third, one-half, or three-fourths, would have nothing to do, so far as any precedent is concerned, as to what we had done on Eleventh street or ought to do on Eleventh street.

By Mr. CONNELL:

Q. If I understand you, Mr. Holdrege, the cost of the construction of the Tenth-street viaduct was contributed or paid in by the Union Pacific Company and your company, was it not?

A. The Omaha——

Q. Just answer that question. Is not that true that that cost was paid in or contributed by your respective companies? Is that so or is it not? I am not asking in regard to the proportion.

A. Not, perhaps, entirely. If I would answer it directly, the fact is, the Omaha Union Depot & Railway Company, at the time they constructed that viaduct expected to have assistance from the city in aid of their entire enterprise of one hundred and fifty thousand dollars, and, after the money was in the treasury, what part of it was city money and what part was Union Pacific money——

101 Q. What I wish to know is, if it is not a fact that the cost of constructing that Tenth-street viaduct was contributed by these two companies that I have mentioned, the Union Pacific and the Chicago, Burlington & Quincy,

A. It is a fact that they owned stock.

Q. Is it not a fact that the money to do that work and buy the material was provided by those two companies? Is not that a fact? Is it or is it not?

A. No; I should not say it was. If you want an answer directly, I will tell you why: The Omaha Union Depot & Railway Company was organized, and the stock was taken by the Union Pacific and Burlington Railway Companies on an agreed proportion, and certain assistance was given by the city to that company. Then I was going to say we were going to sell bonds. This was a temporary advance by the Union Depot and Railway Company. I couldn't say that these two railroads contracted the cost of building this viaduct; the Omaha Union Depot & Railway Company spent the money, and it was expected they would sell their bonds to pay for it.

Q. What other companies besides the Union Pacific and the Chicago, Burlington & Quincy contributed to the construction of the Tenth-street viaduct?

Objected to as wholly immaterial. Objection overruled. Respondent excepts.

A. There didn't any of the companies mentioned in that question contribute money. As I stated before, it was contributed by the Omaha Union Depot & Railway Company.

Q. The cost of the Tenth-street viaduct is paid for?

102 A. I understand it is paid for by the Omaha Union Depot Company.

Q. Now, is there any other company up to this time, or was there any other company during the construction of this viaduct, interested in the depot company except the two companies I have referred to—the Union Pacific and the Chicago, Burlington & Quincy?

A. The other companies have no interest in the Union Depot Com-

pany, and at that time they didn't have these tracks with the Union Pacific.

Q. Those two companies did have the stock in it and were carrying it out together?

A. They had the stock of the Omaha Union Depot & Railway Company.

Q. What portion did the Union Pacific pay towards the cost of the Tenth-street viaduct and what proportion did the Chicago, Burlington & Quincy pay?

Objected to as immaterial. Received subject to objection. Respondent excepts.

A. As I said before, neither of them contributed directly.

Q. What proportion did they contribute to the depot company for the purpose of defraying the cost of the Tenth-street viaduct?

A. They didn't contribute to the depot company for that purpose any of it—that purpose alone.

Q. What proportion did they contribute?

A. They owned the stock in the Union Depot Company equally, half and half.

Q. You constructed together the Sixteenth-street viaduct, did you not?

A. The city constructed that, with assistance from the railroads, under the law existing at that time.

103 Q. That was between the Union Pacific and Burlington railroads?

A. It was a contract between the City of Omaha and the Union Pacific and Burlington Companies, to be built with the aid of the railroads.

Q. Under that arrangement your company was to pay one-third of the amount required to be paid by the companies and the Union Pacific was to pay the remaining two-thirds. Is not that correct?

A. That is shown in the contract?

Q. Is not that correct?

A. I don't know whether it is or not. It is in the contract.

Q. Is there any higher official than yourself connected with the Chicago, Burlington & Quincy railroad in the State of Nebraska, Mr. Holdrege?

A. No, sir.

Q. You have the general management of the entire property and the roads that are operated and are owned by that company west of the Missouri river in the State of Nebraska?

A. Yes; with such authority as is delegated to me.

Q. In these other matters, making these contracts with regard to the construction of this viaduct—I refer to the Sixteenth-street viaduct and also this Eleventh-street viaduct—you acted as the general manager of the company, did you not?

A. Yes, sir.

Q. The company never repudiated your acts, did it?

A. This contract——

Q. Just answer my question.

A. I am going to answer it. I was acting as general manager, but I didn't execute that contract under my own authority; I was authorized to do it by direct reference by the board of directors.

104 Q. I asked you whether the company in any manner ever repudiated any of your acts.

A. I had instructions from the company to sign this contract that was referred to me.

Q. Did you have any instruction to sign this paper relating to the street railway company? Wasn't that presented to you primarily and you signed it as general manager?

A. The whole question was referred to my superior officers and authorized by them.

Q. Was your authority in writing from your superior officers regarding the entering into the contract that you did enter into with the city?

A. Yes, sir; I think it was.

Q. Can you produce it?

A. I probably could find a number of letters on the subject which stated the authority.

Q. Will you produce your authority and submit it to the court?

Objected to.

By the COURT: I don't care to go into that.

By Mr. CONNELL:

Q. You have the actual control of the trains and the supervision of the tracks of this company in Nebraska, have you not, Mr. Holdrege?

A. I have charge of the operation of the road.

Q. And if an order was made by the court to discontinue the running of trains across Eleventh street for the reason that they were dangerous or a nuisance or for any other reason, you would be the officer to require that to be done, would you not, and would

105 have the power and authority to do it without any action by the board of directors or any higher officials? Isn't that so?

A. I should not feel as though I could discontinue the operations of trains on the main track, and if I was so ordered by the court I should try to operate them.

Q. You would operate them regardless of the order?

A. I should try to. If I should receive such an order as that, I should think it was unreasonable, and I would try to operate them. I have never been placed in that position.

Q. You would not wait for the orders of your superior officers in the East?

A. I have been placed here to do that.

By the COURT:

Q. If, under the law of this State, the courts of this State should issue a mandate in an action, you would have no doubt of the ability of your company to obey it, would you?

A. You mean a mandate to repair this viaduct or any mandate?

Q. A mandate in this case. If, under the law, the courts of this State should so order you, would you have any doubt of the ability of your company to obey it?

A. If I should receive such a mandate to spend such an amount of money, I should refer it to my superior officers.

Q. You have no doubt of the ability of your company to obey such a mandate?

A. When it comes to the ability of any company west of the Missouri river to pay its debts I have a great deal of doubt about it, with the way rates are going and under the present State legislation. It is a very doubtful thing whether we can increase
106 the expenditures in any way and pay our bills and make the money go round.

By Mr. CONNELL:

Q. If you had to do that to save running people down and killing citizens, you would have the power to do it, would you not?

Objected to.

(No answer.)

"EXHIBIT A."

City of Omaha, council chamber.

OMAHA, NEB., —— —, 189–.

Resolved by the city council of the city of Omaha, the mayor concurring:

That the com. on viaducts and railways and city engineer examine the roadway and road-bed of the 11th-street viaduct and report to this body if it is necessary to repave said viaduct.

Introduced by Councilman Peter E. Elsasser.

Passed July 21, 1892.

E. P. DAVIS,
President of the Council.

Attest: JOHN GROVES, *City Clerk.*

Approved:

GEO. P. BEMIS, *Mayor.*

Indorsed as follows: No. —. Resolution by Mr. Elsasser. Roadway 11th-St. viaduct. Received July 21, 1892. John Groves, city clerk. Presented to council July 21, 1892. Adopted. John Groves, city clerk.

107 "EXHIBIT B."

City of Omaha, council chamber.

OMAHA, NEB., *Aug.* 23, 1892.

Mr. President:

Your committee to which was referred a resolution instructing your committee to examine the roadway of the 11th St. viaduct and report if it be necessary to repave said viaduct have carefully examined the same and beg to report as follows:

The roadway of said viaduct is in a dangerous and shameful condition. There is scarcely a yard of pavement that is not full of holes; in fact nearly the entire pavement is rotted away; but far more dangerous is the walk for foot passengers.

We find the walk to be composed of but one thickness of plank, and these planks are warped and rotted, and if not attended to at once may be the cause of a frightful accident at any time.

We find also that the fence separating the footway from the road is broken down in many places, in some cases pieces of the fence being entirely missing.

In its present condition the Eleventh-street viaduct is a disgrace to the city, and we recommend that steps be at once taken to put it in a safe and passable condition.

SOL PRINCE,
GEO. F. MUNRO,
Committee on Viaducts & Railways.

Indorsed as follows: No. —. Report of committee on viaducts & railways. Roadway of 11th St. viaduct. Received Aug. 23, 1892. John Groves, city clerk. Presented to council Aug. 23, 1892. V. & R. and city engineer to report cost of road-bed. John Groves, city clerk.

108 "EXHIBIT C."

City of Omaha, council chamber.

OMAHA, NEB., *Sept.* 2, 1892.

Mr. President:

Your committee to which was referred communication from the city engineer relating to the Eleventh St. viaduct have carefully considered the same and respectfully report as follows:

The action of the city engineer in recommending the closing of the viaduct meets with the approval of your committee, as in our opinion the continuance of its use in its present condition would lead to serious accidents and perhaps loss of life.

Your committee, however, recognizing the hardship to which the residents of the southern part of the city are subjected by the closing of this viaduct, would most earnestly urge upon your honorable body the necessity of opening said viaduct at the earliest possible moment.

Two plans for paving the viaduct have been submitted by the city engineer, and upon his recommendation your committee would recommend the use of creosoteed wood in said paving. This is the most expensive material at present, but will prove the most economical in the end.

Your committee have left the financial question in this matter to the finance committee, who have doubtless a plan for providing the necessary funds.

Respectfully submitted.

SOL PRINCE,
GEO. P. MUNRO,
Committee on Viaducts & Railways.

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FOLDOUTS TOO LARGE TO BE FILMED

109 Indorsed as follows: No. —. Report of committee on viaducts & railways. Communication of city engineer. Received Sept. 2, 1892. John Groves, city clerk. Presented to council Sept. 2, 1892. Finance and city comptroller to look for necessary funds. John Groves, city clerk.

"EXHIBIT D."

Ordinance No. 3734.

An ordinance declaring the necessity of repairing the viaduct on and along South Eleventh street over the railroad tracks from a point near Jackson street to a point near Mason street, in the city of Omaha, and directing the board of public works to prepare plans and specifications for the repairing of said viaduct, etc.

Whereas, that the Eleventh street viaduct extending from a point near Jackson street to a point near Mason street is unsafe and is in a dangerous condition; and

Whereas it is necessary for the safety and protection of the public that said viaduct be repaired, therefore,

Be it ordained by the city council of the city of Omaha:

SECTION 1. That it is necessary and it is hereby deemed and declared necessary for the safety and protection of the public that the Eleventh-street viaduct extending along Eleventh street from a point near Jackson street to a point near Mason street in the city of Omaha be repaired by causing a new and substantial floor to be placed on and across said viaduct.

SECTION 2. For the purpose of determining the material to be used in the repairing of said viaduct and the manner and construction thereof, the board of public works of the city of Omaha are hereby ordered and directed within one week from the passage of this ordinance to prepare the plans and specifications for said repairs and to submit the same to the mayor and city council
110 for their consideration, action and approval, and the city engineer for the purpose of enabling the said board of public works to submit said plans and specifications as herein required, is hereby ordered under the direction of the board of public works to render such service to said board in preparing plans, drawings, details and specifications for the repairing of said viaduct as may be necessary for said purpose and as may be required by said board of public works.

SECTION 3. That this ordinance take effect and be in force from and after its passage.

Passed December 4th, 1893.

JOHN GROVES, *City Clerk.*
WM. F. BECHEL,
President City Council.

Approved Dec. 12th, 1893.

GEO. P. BEMIS, *Mayor.*

(Here follows diagram marked p. 111.)

112 "EXHIBIT F."

Ordinance No. 3752.

An ordinance approving the plans and specifications submitted by the board of public works for the repairing of the Eleventh-street viaduct over the railroad tracks and ordering the repairing of said viaduct to be done.

Whereas, it has been and hereby is deemed and declared necessary for the safety and protection of the public that the Eleventh-street viaduct be repaired as herein required; and

Whereas, it is right, proper and reasonable that the railroad companies owning or operating railway tracks across said Eleventh street should make said repairs to said viaduct; therefore

Be it ordained by the city council of the city of Omaha:

SECTION 1. That the plans and specifications submitted by the board of public works of the city of Omaha December 15, 1893, for the repairs of the Eleventh-street viaduct over the railroad tracks upon and across Eleventh street from a point near Jackson street to a point near Mason street in the city of Omaha, as prepared by the city engineer of said city, be and the same are hereby approved and adopted.

SECTION 2. That the Union Pacific Railway Company be and is hereby ordered, directed and required to repair that portion of said Eleventh-street viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct; and the Chicago, Burlington & Quincy Railroad Company, grantee and successor to the Missouri River Railroad Company in Nebraska and the Omaha & Southwestern Railroad Company, be and is hereby ordered, directed and required to repair that portion of said Eleventh-
street viaduct commencing at the south end thereof, and
113 extending northward a distance of one-third of the entire length of said viaduct; the said repairs to be made in accordance with said plans and specifications and to be done under the supervision of the city engineer; the said repairs to be commenced without unnecessary delay and fully completed as herein required within ninety days from the passage and approval of this ordinance.

SEC. 3. That the city clerk be and is hereby directed to furnish to said Union Pacific Railway Company and to said Chicago, Burlington & Quincy Railroad Company owning or operating railroad tracks upon and across said Eleventh street under said Eleventh-street viaduct, a duly certified copy of this ordinance without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs.

SEC. 3. That this ordinance shall take effect and be in force from and after its passage.

Passed Jan. 30, 1894.

W. C. WAKELEY, *City Clerk.*
EDW. E. HOWELL,
President City Council.

Approved Feb. 2nd, 1894.

GEO. P. BEMIS, *Mayor.*

114 EXHIBIT 1.

OMAHA, *April 23rd*, 1889.

To the mayor and council of the city of Omaha:

The undersigned, the companies contributing towards the construction of the viaduct on 11th street, in this city, do hereby approve the rights and privileges granted to the Omaha Motor Railway Company by an ordinance entitled "An ordinance granting the right to construct and use two tracks over the 11th-street viaduct to the Omaha Motor Railway Company, subject to certain conditions," approved April 20th, 1889, being No. 2017.

THE OMAHA & SOUTHWESTERN RAILROAD COMPANY,
By G. W. HOLDREGE, *General Manager.*
THE UNION PACIFIC RAILWAY COMPANY,
By THOS. L. KIMBALL, *General Manager.*

On the back of the above instrument appear endorsements in words and figures following, to wit:

Ap'l 23, 1889. From Omaha & Southwestern R. R. Co. and Union Pacific R. R. Co., approved of right to Motor R. R. Co. for tracks on 11 St. viaduct.

115 "EXHIBIT 2."

Viaducts—11th and 16th streets.

Articles of agreement, executed in triplicate, made and concluded this first day of February, 1886, by and between the City of Omaha party of the first part, and the Union Pacific Railway Company and the Omaha & Southwestern Railroad Company, parties of the second part, witnesseth:

That the said parties of the second part, in pursuance of the provisions of an act of the legislature of the State of Nebraska, entitled "An act to provide viaducts, bridges, and tunnels in certain cases in cities of the first class," do hereby assume and agree to pay, as may be required by the mayor and city council of said city, three-fifths of the entire cost of constructing a viaduct along Eleventh street and three-fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not

to exceed the sum of ninety thousand dollars ($90,000), the amount so assumed and agreed to be paid, being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part, as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company, and one-fourth thereof to be paid by said Omaha & Southwestern Railroad Company.

The said parties of the second part, in pursuance of the provisions of said act, also assume and agreee to pay, as may be required by said mayor and city council, three-fifths of the entire cost of con-
116 structing a viaduct along Sixteenth street in said city over the railroad tracks of said parties of the second part, and three-fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of thirty thousand dollars ($30,000), the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part, as follows: Two-thirds thereof to be paid by said Union Pacific Railroad Company, and one-third thereof to be paid by said Omaha & Southwestern Company.

The plans and specifications for said viaducts, before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part, and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of such increased cost and damages, in the same manner and according to the same division as hereinbefore agreed.

The said parties of the second part also agree, during the present year (1886), to open Seventh street in said city through their rights of way, so as to leave a clear and unobstructed roadway fifty feet in width from curb to curb, and sidewalks ten feet in width on each side of said roadway and outside of said curbs, thereby making a total opening of seventy feet, and to build proper, substantial stone
117 retaining walls on the outside of said walks, and make sufficient and suitable provisions for lighting said walks and roadway, and thereafter, both day and night, keep said walks and roadway well and sufficiently lighted, so as to enable teams and pedestrians, at all times, to use the same, the said parties of the second part to have the right to place iron posts in line with said curbs, to support the superstructure or bridge over the same.

The said parties of the second part also agree to open Thirteenth street in said city through their rights of way, so as to leave a clear and unobstructed roadway sixty feet in width from curb to curb, and sidewalks twenty feet in width on each side of said roadway and outside of said curbs, thereby making a total opening of one hundred feet, and to build proper, substantial stone retaining walls on the outside of said sidewalks, the said parties of the second part to have the right to place iron posts in line with said curbs to support the superstructure or bridge over the same.

The said parties of the second part also agree to open Twentieth street in said city through their rights of way to the full width of said street.

In consideration of the full performance by said parties of the second part of the foregoing agreements, the City of Omaha, party of the first part, hereby agrees, by ordinance, to close the following streets across the present rights of way of said parties of the second part, to wit: Sixth street, Twelfth street, Fifteenth street.

It is also agreed that Eighteenth and Nineteenth streets in said city are to remain as at present.

It is also agreed that Fourteenth street in said city, across the present rights of way of said parties of the second part, shall remain the same as it now is until the completion of said Sixteenth-street viaduct, and then, if it shall be declared by the mayor and council that public necessity so demands, it shall be opened by said par-
118 ties of the second part in such manner as the mayor and council may require, not exceeding thirty feet in width.

In witness whereof, the said parties hereto affix their names at Omaha, Nebraska, this first day of February, 1886.

(Signed) THE CITY OF OMAHA,
By JAMES E. BOYD, *Mayor.*
UNION PACIFIC R'L'Y CO.,
By S. R. CALLAWAY, *General Manager.*
OMAHA & SOUTHWESTERN R. R. CO.,
By G. W. HOLDREGE.

In presence of—
H. KOUNTZE.

"EXHIBIT 3."

Ordinance No. 937.

An ordinance authorizing the mayor by contract to grant to the Union Pacific Railway Company and the Burlington & Missouri River Railroad Company in Nebraska certain rights and privileges, subject to certain conditions.

Be it ordained by the city council of the city of Omaha:

SECTION 1. That the mayor of the city of Omaha be, and hereby is, authorized and empowered to enter into an agreement and contract with the Union Pacific Railway Company and the Burlington & Missouri Railroad Company in Nebraska, whereby, in consideration of the said railroad companies assuming three-fifths of the cost, including damages to abutting property, of a viaduct crossing the railroad tracks of said companies on Eleventh street in said city, commencing at or near Jackson street and extending to or near Mason street, according to such plans as may be adopted by the mayor and council, the same to be constructed as soon as possible, and as soon as said mayor and council may
119 require, and complying with an act of the legislature of the State of Nebraska entitled, "An act to provide for viaducts,

bridges, and tunnels in certain cases in cities of the first class," approved March 4th, 1885, the city will close Sixth street from the north line of Pacific street to the south line of the alley between Mason and Marcy streets, and Twelfth street between blocks 201 and 202, and so much of Marcy street as lies in line of Twelfth street and is covered by right of way. The city, in consideration of the premises, is also to permit and allow said companies, at their own expense, to bridge Seventh street in said city along their respective rights of way, but in such manner as will leave a clear roadway of fifty feet from curb to curb, and a space of ten feet outside of said curb for sidewalks, and so as to allow reasonable and proper ventilation and admit sufficient light, the said companies, at their own expense, to keep the space under the portions of the bridge constructed by each respectively sufficiently lighted at all times by either natural or artificial light, and said companies are also to have the right to bridge Thirteenth street, but so as to leave a clear roadway of sixty feet from curb to curb and a space on the outside of each of said curbs of twenty feet for sidewalks, and so as to admit of ventilation and light, and are also to have the right to place iron posts for the support of said bridges over said Seventh and Thirteenth streets, on the line of said curbs.

SECTION 2. This ordinance shall take effect and be in force from and after its passage.

Approved September 8, 1895.

120 "EXHIBIT 4."

Ordinance No. 2017.

Omaha Motor Railway Company to Use Eleventh-street Viaduct.

An ordinance granting the right to construct and use two tracks over the Eleventh-street viaduct to the Omaha Motor Railway Company, subject to certain conditions.

Be it ordained by the city council of the city of Omaha:

SECTION 1. That the right to construct and use two tracks over and along the Eleventh-street viaduct, in the city of Omaha, is hereby granted to the Omaha Motor Railway Company of Omaha, subject to the following conditions, to wit:

The said Omaha Motor Railway Company shall obtain such changes as may be necessary in the roadway of said viaduct for the purpose of laying said tracks, and pay the cost thereof, as well as all costs or expense caused or made by reason of laying said tracks on said viaduct; and shall keep said tracks in good condition and pave and repave between the rails of said tracks, at its own expense, at such times and in such manner as the mayor and city council may by ordinance require.

SEC. 2. Said motor railway company, after entering upon said viaduct for the purpose of laying their tracks, shall prosecute the work with all possible speed and complete the same with-

out delay, and with the least possible inconvenience to the public use of said viaduct; and the rails to be used on said viaduct shall have wide flanges so as to accommodate the wagon travel of the viaduct; and the rails shall be kept on a level with the general roadway. Said work shall be done under the supervision and direction of the city engineer and board of public works.

121 SEC. 3. The use of said tracks by said company, and the manner and time of running cars thereon, shall at all times be subject to such reasonable rules and regulations as may be prescribed by ordinance.

SEC. 4. The tracks over and along said viaducts and the approaches and tracks leading to said viaduct to the distance of 600 feet from either end of the viaduct, may be used by such other street railway companies as the mayor and council, by ordinance, may grant the right so to do, upon such terms and conditions as may be by ordinance provided.

SEC. 5. The rights and privileges herein granted are upon the further condition that for the use of said viaduct said Omaha Motor Railway Company shall pay for the first five years a nominal rental of five ($5.00) dollars per year, and such other railway companies to whom may be granted the right to cross said viaduct shall be governed by the same condition.

The said Omaha Motor Railway Company, or other companies to whom the right may be granted, upon the expiration of said five years shall pay such reasonable annual rental to the city as may from time to time be fixed and determined by ordinance.

SEC. 6. The said Omaha Motor Railway Company shall, within six months after the passage of this ordinance, operate a double-track line of street cars across said viaduct along Eleventh street as far south as Vinton street and shall hereafter continue to operate said line in the manner herein prescribed.

SEC. 7. The rights and privileges herein granted are also subject to the approval of the railroad companies contributing towards the construction of said viaduct.

122 SEC. 8. The said Omaha Motor Railway Company shall protect the city against any claim or action for damages resulting from the use of said viaduct by said company, or which may be caused by the negligence of said company.

SEC. 9. The Omaha Motor Railway Company, to obtain any right or benefits granted, shall, within thirty days from the passage of this ordinance, file with the city clerk a written acceptance of all the provisions and conditions hereof; but such acceptance shall in no event be construed as a waiver of any existing rights conferred upon such company by its charter.

SEC. 10. The Omaha Motor Railway Company shall, at the time they accept the provisions of this ordinance, file a bond with the city in the sum of twenty thousand ($20,000) dollars for the faithful performance of the provisions of the ordinance; said bond to be signed by two sureties, subject to the approval of the mayor and city council.

If the Omaha Motor Railway Company, after it shall accept the

terms and conditions of this ordinance, shall fail to comply with the terms and conditions of this ordinance, then the Omaha Motor Railway Company shall forfeit its rights under this ordinance, whenever the mayor and council shall so determine by ordinance or concurrent resolution.

SEC. 11. That this ordinance shall take effect and be in force from and after its passage.

Approved April 20th, 1889.

Accepted by Omaha Motor Railway Company April 23, 1889.

123 "EXHIBIT 5."

No. 729.

An ordinance granting to the Omaha and South Western Railroad Company the right of way through portions of Tenth, Eleventh, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Marcy, Mason, Pacific, Williams, and George street-, and the alleys in blocks numbered two hundred twenty (220), four hundred twenty-three (423), and two hundred fifty-five (255), in the city of Omaha.

By it ordained by the city council of the city of Omaha:

Section one.

That there is hereby granted and confirmed unto the Omaha and South Western Railroad Company, the right of way, along upon, through and across Tenth street in the city of Omaha at a point between Mason and Marcy streets: thence along, upon, through and across the alley in block two hundred twenty (220) between Tenth and Eleventh streets: thence along, upon, through and across, Eleventh street at about its intersection with Marcy street: thence along upon, and through the south side of Marcy street: thence along upon and through the south side of Marcy street from about the intersection of said Marcy street with Eleventh street to the east line of Thirteenth street: thence along upon, through and across the alley in block two hundred twenty-three (223) between Thirteenth and Fourteenth streets: thence along upon, through and across Thirteenth street at a point between Marcy and Mason streets; thence along upon, through and across Fourteenth street, at a point between Marcy and Mason streets; thence along, upon through and across Mason street at a point between Four-
124 teenth and Fifteenth streets: thence along, upon through and across Fifteenth street at a point between Mason and Pacific streets: thence along, upon through and across Pacific street at a point between Fifteenth and Sixteenth streets; thence along, upon through and across the alley in block two hundred fifty-five (255) between Fifteenth and Sixteenth streets; thence along, upon through and across Pierce street at about its intersection with Sixteenth street; thence along, upon, through and across Sixteenth, Seventeenth and Eighteenth streets at points about paral-el to, and

south of the crossing of the Union Pacific railway across said Sixteenth, Seventeenth and Eighteenth streets; thence along, upon through and across Williams street at the intersection of said street with Eighteenth street; thence along, upon through and across Nineteenth street and George street at points about parallel to and south of the crossing of the Union Pacific railway across said Nineteenth street and George street, in said city of Omaha.

Section two.

Said Omaha and South Western Railroad Company shall have the right to construct, maintain and operate a line of railroad, along, upon, through and across said portions of said streets and alleys as a part of its line.

Provided, that said railroad track and tracks are constructed so as to conform to the grade of said street as near as may be, and so as to interfer- as little as possible with the travel along and upon said streets, and,

Provided, that nothing herein contained shall be construed as interfering with the right of any property-owner to recover from said company and damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize and interference with the tracks of the Union Pacific Railway Company now laid and operated by said Union Pacific Railway Company in any portions of the streets and alleys herein named and enumerated.

Section three.

This ordinance shall take effect and be in force from and after its passage.

Passed May 14th, 1884.

P. F. MURPHY,
President City Council.

Attest: J. J. Q. JWETT, *City Clerk.*

Approved May 14th, 1884.

CHAMPION S. CHASE, *Mayor.*

On the back of said ordinance appear endorsements in words and figures following, to wit: Copied. No. 729. (38.) Introduced by Councilman John F. Behm. 1st reading, 2nd reading.

I hereby certify that the foregoing is a true and complete copy of all the evidence offered or given by both parties upon the trial of the above-entitled cause.

H. B. BOYLES,
Official Stenographer, Fourth Judicial District, Nebraska, Omaha, Nebraska.

(Endorsed:) 7805. C., B. & Q. *v.* State *ex rel.* Omaha. Bill of exceptions. Supreme court of Nebraska. Filed Jun-12, 1895. D. A. Campbell, clerk.

126 And afterwards, to wit, on the 18 day of June, 1895, there was filed in the office of the clerk of said court a certain proof of service of briefs in words and figures following, to wit:

Received copy of this June 18, 1895.

C. J. GREENE,
Att'y for Pl'ff in Error.

Supreme court of Nebraska. Filed June 18, 1895. D. A. Campbell, clerk.

127 And afterwards, to wit, on the 6 day of November, 1895, the following order was made by said court and entered of record, to wit:

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA.	Error from the District Court of Douglas County. No. 7805.

On motion of the plaintiff, leave is hereby given it by the court to serve and file its briefs herein by November 20, 1895.

128 And afterwards, to wit, on the 7 day of January, 1896, there was filed in the office of the clerk of said court a certain proof of service of briefs in words and figures following, to wit:

Service of within brief accepted & 2 copies received this 15th day of December, 1895.

W. J. CORNISH,
Att'y for Defendant in Error.

Supreme court of Nebraska. Filed Jan. 7, 1896. D. A. Campbell, clerk.

129 And afterwards, to wit, on the 21 day of January, 1896, the said cause was argued and submitted, the order being as follows:

The following case was argued and submitted:

Chicago, B. & Q. R. Co. *v.* State *ex rel.* The City of Omaha. Error from Douglas county.

And afterwards, to wit, on the 18 day of March, 1896, the following judgment was rendered by said court and entered of record, to wit:

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error,
v.
THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Defendant in Error.

Error from the District Court of Douglas County. No. 7805. Judgment of Affirmance.

This cause came on to be heard, was taken up, and argued by counsel; on consideration whereof the court finds there is no error apparent on the record in the proceedings and judgment of the district court. It is therefore considered by the court that the said judgment be, and the same hereby is, affirmed, and that the defendant in error recover of the plaintiff in error its costs, taxed at $—, and that a mandate issue accordingly.

And on the same day, to wit, the 18 day of March, 1896, there was filed in the office of the clerk of said court a certain opinion in words and figures following, to wit:

130 THE CHICAGO, B. & Q. R. Co.
v.
STATE *ex Rel.* CITY OF OMAHA. } No. 7805.

The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large.

2. The legislature cannot under the guise of police regulations arbitrarily invade personal rights or private property. There must be some obvious and real connection between the actual provisions of such measures and their assumed purpose.

3. Due process of law, as the term is used in the State and Federal constitutions, does not necessarily imply a hearing, by one whose property is taken or damaged for public use, according to the established practice in courts of common law or equity, but is satisfied whenever an opportunity is afforded to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained.

4. The power of the legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety is inherent in the sovereignty of the State and cannot be bartered by contract or otherwise.

5. Such power may be asserted directly by the legislature or may, in the absence of constitutional restrictions upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise.

131 6. The power of the legislature over private property is not absolute; but while it cannot at will impose upon property burdens so excessive and unreasonable as to work a practical confiscation thereof, the courts will never interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the law-making power of the Government respecting the wisdom or necessity of particular measures.

7. The provision of the charter of the city of Omaha (sec. 48, chap. 12*a*, Comp. Stats.) authorizing said city, by ordinance, to require railroad companies to construct and keep in repair viaducts over streets therein crossed by their tracks is a valid exercise of the police power of the State.

8. Ordinance requiring the reconstruction by two railroad companies of specific portions of a viaduct previously erected by them jointly with the city held not to violate prior contract obligations.

9. Nor is such ordinance void as against the railroad companies therein named as the owners of said roads for the failure of the city to proceed against other companies engaged in operating one or more of said tracks as lessees of the owners, the charter obligation being imposed upon railroad companies owning or operating separate lines of track.

10. The duty of railroad companies to construct or repair viaducts within the city of Omaha may be enforced by writ of mandamus.

132 POST, *C. J.*:

This was a proceeding on the relation of the City of Omaha to require The Chicago, Burlington and Quincy Railroad Company, hereafter referred to as the respondents, to repair the south one-third of the so-called Eleventh-street viaduct in said city. There was a trial upon issues joined in the district court for Douglas county, resulting in a finding and judgment in accordance with the prayer of the relator, and which has by appropriate proceedings been removed into this court for review.

It is essential to a perfect understanding of the questions discussed to refer in detail to the legislation of the State and the city, so far as it relates to the subject of the controversy, and in so doing we will follow the order in which they are presented in the valuable brief submitted in behalf of the respondent.

In the year 1869 the Omaha and Southwestern Railroad Company was organized under the general statutes of this State, and immediately thereafter constructed a line of road from the city of Omaha in a southwesterly direction to a point on the Platte river in Sarpy county, and which it continued to operate until the year 1871, when it transferred all of its property and franchises to the Burlington and Missouri River Railroad Company, also a Nebraska corporation, by lease for 999 years. Said road was by the last-named company operated until 1880, in which year it was, together with all the property and franchises of the original corporation, transferred to the respondent company, a corporation of the State of Illinois. Sec. 83, chap. 25, Rev. Stats. 1866, under which the Omaha and Southwestern Company was organized, contained, among other provisions, the following:

133 "SEC. 83. If it shall be necessary in the location of any part of any railroad to occupy any road, street, alley or public way or ground of any kind or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authority owning or having charge thereof and the rail-

road company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied."

In the year 1884 application was by the last-named company made to the city for permission to lay its tracks over and across certain streets therein, including Eleventh street; and in response to that request an ordinance, No. 729, was enacted and approved in the following language:

"Said Omaha & Southwestern Railroad Company shall have the right to construct, maintain and operate a line of railroad along, upon, through and across said portion of said streets and alleys as a part of its line; provided that said railroad track and tracks are constructed so as to conform to the grade of said streets as near as may be, and so as to interfere as little as possible with the travel along and upon said streets; and provided, that nothing herein contained shall be construed as interfering with the right of any property-owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company, now laid and operated by said Union Pacific Railway Company in any portion of the streets and alleys herein named and enumerated."

134 Pursuant to said ordinance the respondent soon thereafter constructed a track from Tenth street across Eleventh street and thence in a southwesterly direction to the city limits. Long previous to the last-mentioned date the Union Pacific Railroad Company had, with the consent of the city, constructed twenty-one or more tracks across Eleventh street, which have ever since been in continual operation for general traffic and for switching purposes, so that the additional tracks therein of the respondent did not materially increase the inconvenience or danger of the public in the use of said street.

By sections 1, 2, and 4 of an act entitled "An act to provide for viaducts, bridges, and tunnels in certain cases in cities of the first class," approved March 4, 1885 (Session Laws 1885, p. 109*m*, chap. 12), it was declared:

"SECTION 1. That the mayor and city council in any city of the first class shall have power, whenever they deem any improvement, herein provided for, necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct or bridge over, or tunnel under any railroad track or tracks, switch or switches in such cities, when such track or switches cross or occupy any street, alley or highway thereof, in the manner and to the extent hereinafter provided.

SEC. 2. Whenever any such viaduct, bridge or tunnel shall be deemed necessary, as provided in the preceding section, the mayor and city council shall have the power to secure and adopt plans and specifications therefor, together with the estimated cost of the work, and thereupon, if the railroad company or companies, across whose tracks or switches the work is proposed to be built, will assume three-fifths ($\frac{3}{5}$) of the entire cost thereof, and

135 three-fifths ($\frac{3}{5}$) of all damages to abutting property on account

of construction of said viaduct, bridge or tunnel, and secure to the city the payment of the necessary funds to meet it as the work progresses, in such manner and with such security as the mayor and city council shall require, and when the payment of the further sum of one-fifth ($\frac{1}{5}$) of the money required for said improvement is arranged for in manner satisfactory to said mayor and council, either by private donation or by execution of good and sufficient bond as will protect said city from the payment of said one-fifth ($\frac{1}{5}$) then the said mayor and council may proceed to contract with the necessary party or parties for the construction of such viaduct, bridge or tunnel, under the supervision of the board of public works of such city, and to provide for the payment of one-fifth ($\frac{1}{5}$) of the cost thereof by the city, by special tax on all taxable property in such city, and one-fifth ($\frac{1}{5}$) by special tax to property benefitted, as provided in the following section, if not otherwise provided for.

SEC. 4. The city, with the assent of the railroad company or companies aiding in the construction of any such viaduct, bridge or tunnel as herein provided, may permit any street railway company to build its street railway track and operate its railway upon or through the same, upon such terms and conditions and for such compensation as shall be agreed upon between the city and the street railway company. And the compensation paid for such use shall be set apart and used towards the maintenance of such viaduct, bridge or tunnel."

136 In virtue of the foregoing provisions the city, the Union Pacific Company, and the respondent in the year 1886 entered into an agreement in writing, the essential part of which is as follows:

"* * * witnesseth: That the said parties of the second part in pursuance of the provisions of an act of the legislature of the State of Nebraska, entitled, 'An act to provide for viaducts, bridges and tunnels in certain cases in cities of the first class,' do hereby assume and agree to pay, as may be required by the mayor and city council of said city, three-fifths of the entire cost of constructing a viaduct along Eleventh street in said city over the railroad tracks of said parties of the second part, and three-fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of ninety thousand dollars ($90,000), the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company and one-fourth thereof to be paid by said Omaha & Southwestern Railroad Company. * * *

The plans and specifications for said viaducts, before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part, and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase

the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of such increased cost and damages, in the same manner and according to the same division as hereinbefore
137 agreed." * * *

Pursuant to that agreement, the viaduct in question was constructed and dedicated to the use of the public early in the year 1887.

In the year last named a new charter was provided for the city by an act entitled "An act incorporating metropolitan cities and defining and prescribing their duties, powers, and government" (Session Laws 1887, p. 105, ch. 10), section 48 of which, as amended in 1893, reads as follows:

"SEC. 48. The mayor and council shall have power to require any railway company or companies owning or operating any railway track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. * * * When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and of the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. It shall be the duty of any railroad company or companies upon being required as herein provided to erect, construct, reconstruct, or repair any viaduct, to proceed within the time and in the manner required by the mayor and council, to erect, construct, reconstruct or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect or refuse
138 to perform such duty, and upon conviction any such company or companies shall be fined one hundred dollars ($100) and each day any such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and in addition to the penalty herein provided any such company or companies shall be compelled by mandamus or other appropriate proceedings to erect, construct, reconstruct or repair any viaduct as may be required by ordinance as herein provided. The mayor and council shall also have power whenever any railroad company or companies shall fail, neglect or refuse to erect, construct, reconstruct or repair any viaduct or viaducts after having been required so to do as herein provided, to proceed with the erection, construction, reconstruction or repair of such viaduct or viaducts by contract or in such other manner as may be provided by ordinance, and assess the costs of the erection, construction, reconstruction or repair of such viaduct or viaducts against the property of the railroad company or companies required to erect, construct, reconstruct or repair the same, and such cost shall be a valid and subsisting lien against such property and shall also be a legal indebtedness of said company or companies in favor

of such city, and may be enforced and collected by suit in the proper court." (Session Laws 1893, p. 70, ch. 3, sec. 7.)

In the month of January, 1894, the relator having determined from the report of the city engineer, the board of public works, and other competent evidence that extensive repairs were required upon said viaduct by reason of structural weakness thereof and other causes, enacted an ordinance approving the plans and specifications therefor previously submitted by the city engineer, sections 2 and 3 of which reads as follows:

139 "SEC. 2. That the Union Pacific Railway Company be and is hereby ordered, directed and required to repair that portion of said Eleventh-street viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct and the Chicago, Burlington & Quincy Railroad Company, grantee and successor to the Burlington & Missouri River Railroad Company in Nebraska and the Omaha & Southwestern Railroad Company, be and is hereby ordered, directed and required to repair that portion of said Eleventh-street viaduct commencing at the south end thereof, and extending northward a distance of one-third of the entire length of said viaduct; the said repairs to be made in accordance with said plans and specifications and to be done under the supervision of the city engineer; the said repairs to be commenced without unnecessary delay and fully completed as herein required within ninety days from the passage and approval of this ordinance."

"SEC. 3. That the city clerk be and is hereby directed to furnish to said Union Pacific Railway Company and to said Chicago Burlington & Quincy Railroad Company owning or operating railroad tracks upon and across said Eleventh street under said Eleventh-street viaduct, a duly certified copy of this ordinance without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs."

Notice of the foregoing order was in due form served upon the respondent as well as upon the Union Pacific Railroad Company, and upon the refusal of the former to comply with the terms of the ordinance this proceeding was instituted with the result stated.

140 The first proposition asserted by the respondent is that sec. 48, above set out, has a prospective operation only and does not in terms or by implication apply to viaducts in existence at the time it took effect. We are, however, unable to accept counsel's definition of a retrospective law. A statute does not operate retroactively from the mere fact that it relates to antecedent events. A retrospective law has been defined as one intended to affect transactions which occurred, or rights which accrued, before it became operative as such, and which ascribes to them effects not inherent in their nature in view of the law in force at the time of their occurrence. Bishop, Written Laws, sec. 83; Black, Interpretation of Laws, p. 247.

The language employed in the statute is any viaduct or viaducts,

and must, when read in the light of the authorities cited, be held to include such as were then in existence as well as those subsequently constructed.

The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public. It is one of the powers which has been reserved by the people of the State, and which cannot be surrendered, to require persons and corporations to so exercise and enjoy their rights as not, unnecessarily, to injure others. That the principle stated is especially applicable to existing rights, without regard to the time of their acquirement or to the source from whence they are derived, appears to us a self-evident proposition not requiring argument, and the subject will not hereafter be further pursued in this connection.

141 The next and most important subject of inquiry is presented by respondent's contention that the ordinance under which the city proceeded in ordering the repairs in question contemplates the taking of its property without due process of law within the meaning of the State and Federal constitutions, and also impairs the obligation of the contract under which its track was laid and under which said viaduct was constructed.

The difficulty attending a solution of the questions presented by this assignment is augmented from the fact that courts have not always observed the distinction between the different reserved powers of the State and have cited indiscriminately cases involving the police power, the taxing power, and the power of eminent domain. Nor is the confusion on that account at all strange when we remember that those powers all depend for their vitality upon a common principle, viz., the subordination of private rights to the public welfare of the individual to the community. Of the cases frequently cited to illustrate that principle many involve an application of two or more of the powers enumerated, while in others the line of distinction is by no means clearly apparent. Many attempts at defining the police power have been made, but in none has the limit of its exercise been defined with precision. It is, in the language of Chief Justice Shaw in Commonwealth *v.* Alger, 7 Cush. (Mass.), 53, "much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise." Doubtless the safe course to pursue in attaining the desired result is that which is characterized by Mr. Justice Miller in Davidson *v.* City of New Orleans, 96 U. S., 97, as

142 "the gradual process of judicial inclusion and exclusion."

We held in Smiley *v.* McDonald, 42 Neb., 5, that the legislature cannot under the guise of a police regulation arbitrarily invade private property or personal rights, but that the court must be able to perceive some clear and real connection between the assumed purpose of the law and its actual provisions. The obvious purpose of the legislation in this case, both State and municipal, is to promote the convenience and safety of the public at a grade crossing which is judicially recognized as a place of danger. It is, in short, the exercise of the governmental power and duty to secure a safe

and necessary highway, and must be upheld, if at all, as a legitimate exercise of the police power of the State. The authorities which fully sustain this proposition will be noticed in the course of our further examination of this case and need not be here cited.

The questions presented by this assignment are in principle nearly allied, covering substantially the same field of inquiry, and will, for convenience, be considered together.

The proceeding by the mayor and council is, it is claimed, essentially judicial in character, and, to use the language of the respondent, "such proceeding without notice to those concerned and without giving them an opportunity to be heard violates every maxim and principle of constitutional government."

The term due process of law is, like the police power of the State, not susceptible of a precise definition. However, that of Judge Cooley appears to have proved the most acceptable to the courts of this country, viz: "Due process of law in each particular case means an exertion of the powers of government as the settled maxims of the law permit and sanction and under such safeguards for the protection of individual rights as these maxims prescribe
143 for the class of cases to which the one in question belongs."

In Board of Directors *v.* Collins, 46 Neb., 411, we held, in effect, that the constitutional requirement with respect to that subject does not imply a hearing according to the established practice in courts of common law or equity, but that it is satisfied whenever the citizen whose property is taken or damaged for public use is afforded an adequate remedy therefor in a court of competent jurisdiction.

And the doctrine is now firmly established, although after some diversity of opinion, that previous notice and an opportunity to be heard by persons thereby affected is not indespensible to a valid exercise of the police power or the power to levy and collect taxes, whether ad valorem, by the ordinary means, or such as are denominated special assessments and chargeable against particular property.

In McMillen *v.* Anderson, 95 U. S., 37, Mr. Justice Miller, in holding that the courts of the United States could not be invoked to prevent the collection of an alleged illegal license tax levied by the State of Louisiana, on the ground that the effect thereof was to take the petitioner's property without due process of law, said: "It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present or had an opportunity to be present in some tribunal when it was assessed; but this is not and has never been considered necessary to the validity of a tax. * * * Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that State, as in others, if compelled to pay the tax by a levy upon
144 his property, he can sue the proper party and recover back the money as paid under duress, if the tax was illegal."

True, it was said in Barker *v.* City of Omaha, 16 Neb., 269, that "notice in some form must be given a property-owner before a special assessment upon his property becomes fixed and irrevo-

*k*able;" but the learned author of that opinion did not say or imply that the means of redress afforded in other cases against illegal assessment fails to satisfy the constitutional inhibition against the taking of property without due process of law. What is meant, and what is the doctrine of the authorities there cited, is that a property-owner shall, before being required to pay, have an opportunity to be heard in the courts in a proceeding instituted by himself or by the municipality to which the taxing power of the State has been by law entrusted. Although there are many cases in the State and Federal courts in harmony with the opinion of Justice Miller from which the foregoing is quoted and fully sustaining the proposition here asserted, we prefer to confine our examination of such as involve an exercise of the police power rather than the power of taxation.

In Woodruff *v.* Catlin, 54 Conn., 295, it is said: "The legislature, having determined that the intersection of two railways in a highway in the city of Hartford at grade is a nuisance, dangerous to life, in the absence on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersections; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone or in part
145 by both; * * * and it has the power to do all this for the specified purpose and to do it through the instrumentality of a commission" appointed for the purpose. Appeal of New York & N. E. R. Co., 58 Conn., 532, involved the constitutionality of an act of the legislature limiting the amount chargable to a town or village, on the separation of the grade of a highway from that of a railway track situated therein, to one-fourth of whole cost of such improvement. Such a limitation, it was argued, authorized the taking of the appellant's property without due process of law, inasmuch as it prevented the commissioner to whom the discretion was entrusted from apportioning to the city a just and equitable share of the burden imposed by the act. But the court held otherwise. Carpenter, J., speaking for the court, after remarking that the policy of the law was to abolish grade crossings, said: "Legislation on this subject assumes that each party, in the discharge of its duty, is concerned in creating the danger, and that each may justly be required to contribute to the expense of its removal, or that either may be required to pay the whole, and if each contributes that the proportion which each shall pay may be determined by the legislature in each case as it arises or by general rule by itself or by a delegation of its power to the railroad commissioners. This exercise of power is justifiable on the ground that Government itself in the discharge of its governmental duties undertakes to remove the danger, and does it in the same manner and through the same instrumentalities that it provides and maintains highways through and at the expense of the towns and other corporations. So far as towns are concerned,

it is a duty that has ever devolved upon them to keep the
146 highways reasonably safe. They are compelled to act without compensation or pecuniary profit. Their sole motive is the public welfare. Railroad companies in some sense are but the agents of the Government in affording to the public a more expeditious and vastly improved method of travel. * * * Unlike towns, they do not act upon compulsion, but by choice. Their motive is private gain. Public benefit is incidental. * * * They contribute largely to the danger, and the State may well require them to contribute largely to its removal, * * * requiring the railroad company to pay three-fourths of the expense. However just it might be to require the town to pay more than one-fourth is not a matter of which the railroad company can legally complain."

That doctrine was reasserted by the same court in appeal of New York & N. E. R. Co., 62 Conn., 527, which was, upon proceedings in error to the Supreme Court of the United States, affirmed and the validity of the act in question expressly upheld. See 151 U. S., 556. In the opinion last referred to this language was used by Chief Justice Fuller: "Nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them (railway companies), in particular instances, of the entire expense of the performance of acts required in the public interest in the exercise of legislative discretion, nor are they thereby deprived of property without due process of law by statutes under which the result is ascertained in a mode suited to the nature of the case and not merely arbitrary and capricious, and that the adjudication of the highest court of a State, that in such particulars a law enacted in the exercise of the police power of the State is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States." And sub-
147 stantially similar views are expressed by that court in Missouri P. R. Co. *v.* Humes, 115 U. S., 512, and Eldridge *v.* Frezevant, 16 Sup. Ct. Rep., 345.

In Train *v.* Boston Disinfecting Co., 144 Mass., 529, a regulation of the board of health for the disinfecting of certain vessels and goods imported therein at the owners' expense was assailed on the ground that no provision was by law made for a hearing or for review by appeal or otherwise; but the court pronounced the regulation a reasonable one and defensible as an exercise of the police power of the State.

In Commonwealth *v.* Roberts, 155 Mass., 281, an act required all buildings used for a designated purpose to be supplied with sufficient water-closet connections. It was held, although there was no provision for notice or hearing, that said act was a valid exercise of the police power and applicable to buildings erected before its enactment, as well as to those subsequently constructed.

In People *v.* Boston & A. R. Co., 70 N. Y., 569, the appellant company was required to construct a bridge over a turnpike road on the ground that the State may, under the powers reserved to the

legislature, impose upon railroad corporations such additional burdens as are essential to the public welfare.

In State *v.* Missouri P. R. Co., 33 Kan., 176, the power of the city of Atchison to compel the respondents to construct viaducts was sustained under legislation substantially like that here involved. Referring to the subject of notice, the court, by Valentine, J., observed: "We might, however, say that we do not think it is necessary that the city should have given the railroad company notice before passing the ordinance requiring them (respondents) to construct the viaduct. Notice afterward, with an opportunity on the
148 part of the railroad companies to contest the validity of the ordinance and the right of the city to compel them to construct the viaduct, is sufficient." But the clearest and most satisfactory exposition of the subject is found in Health Department *v.* Rector of Trinity Church, 145 N. Y., 32, which was an action to recover a penalty under a statute requiring all tenement-houses to be supplied with water on each floor occupied or intended to be occupied by one or more families whenever so directed by the board of health. The statute made no provision for notice to property-owners, and none was in fact given, while it was admitted that it would cost the respondent a considerable sum of money to comply with the order of the board. In the opinion of Peckham, J., it is said: "The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case. * * * The fact that the legislature has chosen to delegate a certain portion of its power to the board of health * * * would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order."

And, in answer to the argument that the effect of the act was to impair contract obligations, the same learned judge said: "Laws and regulations of a police nature, although they may disturbe the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use, but simply
149 regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." See also 1 Dillon, Municipal Corporations (4 ed.), sec. 141 and note; Commonwealth *v.* Alger, 7 Cush. (Mass.), 83; Baker *v.* City of Boston, 12 Pick. (Mass.), 183; Thorpe *v.* Rutland & B. R. Co., 27 Vt., 140; Tiedeman, Limitations of Police Power, sec. 124; Prentice, Police Power, pp. 57, 58.

And the principle which underlies all of the cases cited was distinctly recognized by this court in State *v.* Chicago, B. & Q. R. Co., 29 Neb., 412. It will not, of course, be contended that the power of the legislature is in that respect absolute, or that it may at will impose upon property burdens so unreasonable as to work a practi-

cal confiscation. There is, as all admit, a limit beyond which it cannot go and within which it will be confined by the judicial power of the State. Prentice, Police Power, p. 31; Minnesota v. Barber, 136 U. S., 313. But it is unnecessary, if it were possible, to point out the boundary line between reasonable and unreasonable exactions. It is enough that the courts will not interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the law-making branch of the Government respecting the wisdom or necessity of particular measures.

To summarize briefly, we conclude from the foregoing authorities and many others examined that the legislation assailed in
150 this cause is a valid exercise of the police power of the State over the subject to which it applies; that it does not authorize the appropriation of the respondent's property without due process of law in a constitutional sense, since the latter is unable to invoke the equal protection of the law by any appropriate proceeding, and because it did in fact put in issue by the answer both the validity of the ordinance and the reasonableness of the amount apportioned to it for the repair of the viaduct in question; nor is such legislation violative of any contract obligation, since the power to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety cannot be bartered away by contract or otherwise. Such power is inherent in the sovereignty of the State, and may be asserted directly by the legislature, or may, in the absence of constitutional restriction upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise. The single purpose of the legislation, whether contemplating the erection or reconstruction of the viaduct, is to reduce to a minimum the danger to life and limb for which the railroad companies are chiefly responsible, and it is not unreasonable to require the parties to maintain the street in a condition of safety, for whose benefit and convenience it was originally rendered unsafe.

The argument assailing the ordinance on the ground that it requires the respondent to repair the south one-third of the viaduct, instead of contributing a designated part of the entire cost, is, we think, without merit. Section 48, above set out, confers upon the mayor and council of the city plenary powers with respect to
151 the subject. They may by ordinance determine the proportion of the viaduct and approaches to be constructed by two or more railroad companies owning or operating separate lines of track to be crossed thereby, or may determine the cost thereof to be borne by each. The ordinance, if not within the letter of the city's charter, is clearly within its declared scope and purpose; but in the absence of any statute regulating the manner of apportioning the cost of such repairs, it cannot be said that the plan adopted is either so inequitable or unreasonable as to amount to an abuse of the discretion conferred upon the officers of the city. Equally groundless is the contention that the city was required to proceed against the Chicago, Rock Island and Pacific and the Chicago, Milwaukee and St. Paul Railroad Companies, then engaged in operating, jointly

with the Union Pacific Company, certain tracks belonging to the latter across Eleventh street and under said viaduct. The statute, as we have seen, authorizes the city to require two or more railroad companies owning or operating separate lines of track to erect, construct, reconstruct, or repair viaducts. If we admit the companies named as lessees of the Union Pacific Company to be within the terms of the act it does not follow that they are in any sense necessary parties to the proceeding, since the city might still have proceeded against the owners of the tracks operated by them. Such is the plain and necessary inference from the language of the statute.

Lastly it is argued that, conceding the respondents' duty to repair the viaduct as commanded by the ordinance, such duty is not one which will be enforced by means of the writ of mandamus. By reference to section 48 of the city's charter it will be observed that
authority to proceed by mandamus or other appropriate pro-
152 ceedings is therein expressly conferred; but independent of that provision, mandamus has long been recognized as an appropriate remedy, if not the only adequate remedy, in cases of like character. Indeed, so firmly is that rule established by the decisions of this court as not to admit of a doubt at this time. See State *v.* Republican V. R. Co., 17 Neb., 647; S. C., 18 Neb., 512; State *v.* Grand Island & W. C. R. Co., 27 Neb., 694; State *v.* Chicago, B. & Q. R. Co., 29 Neb., 412.

We discover no error in the record, and the judgment of the district court is affirmed.

Affirmed.

153 And afterwards, to wit, on the 7th day of May, 1896, there was filed in the office of the clerk of said supreme court of Nebraska the following petition for writ of error and allowance of same:

154 UNITED STATES OF AMERICA:

To the Honorable David J. Brewer, one of the associate justices of the Supreme Court of the United States:

The Chicago, Burlington & Quincy Railroad Company respectfully shows—

That on the 18th day of March, 1896, the supreme court of the State of Nebraska rendered a judgment against your petitioner in a certain cause therein pending, entitled The Chicago, Burlington & Quincy Railroad Company, plaintiff in error, *vs.* The State of Nebraska *ex relatione* The City of Omaha, defendant in error, affirming the judgment of the district court of Douglas county, Nebraska, in an action or suit brought by the State of Nebraska *ex relatione* The City of Omaha, as relator, against the Chicago, Burlington & Quincy Railroad Company, which judgment directed the issuance of a peremptory writ of mandamus requiring respondent to make certain repairs of the value of above $13,000 upon a specified, arbitrarily determined portion of a viaduct on Eleventh street, in said city,

across the track owned and operated by your petitioner and some twenty or twenty-one additional tracks operated by the Union Pacific Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company, to wit, the whole of one-third of its entire length, beginning at the south end thereof.

Your petitioner further states and claims that the record herewith submitted shows that the track of the plaintiff in error across
155 Eleventh street, in the city of Omaha, under the viaduct thereon was located and constructe l under a contract, the obligation of which is impaired by imposing upon the plaintiff in error the burden of repairing said viaduct; and, further, that said viaduct on Eleventh street, in said city of Omaha, over the track of the plaintiff in error was constructed under a contract made and entered into by authority of law by which the said city of Omaha became obligated to maintain it.

Your petitioner claims the right to remove the said judgment and proceedings to the Supreme Court of the United States by writ of error, under section 709 of the Revised Statutes, because the cause of action set forth in the said petition of the said State of Nebraska on the relation of the said city of Omaha against your petitioner, and upon which the aforesaid judgment was rendered by the district court of Douglas county, Nebraska, and affirmed by the supreme court of Nebraska, was based solely on section 48, chapter 10, Laws of Nebraska, 1887, entitled "An act incorporating metropolitan cities and defining, regulating, and prescribing their duties, powers, and government," approved March 30, 1887, as amended in 1893, and constituting section 7 of an act known as chapter 3, Laws of Nebraska, 1893, entitled "An act entitled An act to amend section 48 of an act entitled 'An act incorporating metropolitan cities and defining, regulating, and prescribing their duties, powers, and government,' approved March 30, 1887, or as subsequently amended, and to repeal said section as heretofore existing," and an ordinance No. 3752 of the city of Omaha, passed by the city council of the city of Omaha on January 30, 1894, in the exercise of
156 authority conferred by the State of Nebraska, all of which appears by record of the proceedings in said cause, duly certified, which is herewith submitted.

Your petitioner states and claims that the said statute of the State of Nebraska and the said ordinance of the said city of Omaha, Nebraska, so, as aforesaid, passed in the exercise of authority conferred by the said State of Nebraska, are in conflict with those portions of the Constitution of the United States known as section 10, article 1, thereof, and the 5th and 14th amendments thereto, and that the said statute of the State of Nebraska and the said ordinance of the city of Omaha, Nebraska, passed under the authority aforesaid, and the said judgment of the supreme court of the State of Nebraska deprive your petitioner of its rights, liberties, and property without due process of law; deny to your petitioner the equal protection of the laws; impair the obligations of the contracts between the city of Omaha and your petitioner; take the private property of your

petitioner for private use without due process of law, and for public use without just compensation.

Your petitioner states that the supreme court of the State of Nebraska is the highest court of law and equity in said State of Nebraska in which a decision can be had in the aforesaid hereinmentioned suit or action.

Wherefore your petitioner prays the allowance of a writ of error returnable in the Supreme Court of the United States, and for a citation, and that, on the execution of the proper supersedeas bond herein, the said judgment pending the said writ of error may be stayed and superseded.

And your petitioner will ever pray.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Petitioner*,
By RALPH W. BRECKENRIDGE,
Attorney for said Petitioner.

157 Let writ of error issue upon petitioner, Chicago, Burlington & Quincy Railroad Company, entering into a bond to the State of Nebraska *ex rel.* City of Omaha in the sum of $25,000, conditioned as by law in such case made and provided.

Washington, D. C., May 1, 1896.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

158 [Endorsed:] 7805. The Chicago, Burlington & Quincy Railroad Company *v.* State of Nebraska *ex rel.* City of Omaha. Petition for writ of error and allowance of same. Supreme court of Nebraska. Filed May 7, 1896. D. A. Campbell, clerk.

159 And also, on the same day, to wit, the 7th day of May, 1896, there was filed in the office of said clerk a certain bond in words and figures as follows, to wit:

160 Know all men by these presents that we, the Chicago, Burlington & Quincy Railroad Company, as principal, and H. W. Yates, as surety, are held and firmly bound unto the State of Nebraska on the relation of the City of Omaha in the sum of $25,000, to be paid to the said State of Nebraska on the relation of the City of Omaha; to which payment, well and truly to be made, we bind ourselves, our successors, assigns, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a term of the supreme court of the State of Nebraska, in a suit pending in said court between The Chicago, Burlington & Quincy Railroad Company, plaintiff in error, *v.* The State of Nebraska *ex relatione* The City of Omaha, a judgment was rendered against the said Chicago, Burlington & Quincy Railroad Company, and the said Chicago, Burlington & Quincy Railroad Company has obtained a writ of error and filed a copy in the clerk's

office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Nebraska on the relation of the said City of Omaha, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from date:

Now, the condition of the above obligation is such that if the said Chicago, Burlington & Quincy Railroad Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

161 By RALPH W. BRECKENRIDGE,
Its Attorney.

HENRY W. YATES.

STATE OF NEBRASKA, } ss:
Douglas County, }

H. W. Yates, being duly sworn, says he is the surety who signed the above and foregoing bond, and that he is worth the sum of $25,000 over and above all his just debts, obligations, and exemptions.

H. W. YATES.

Subscribed in my presence and sworn to before me this 25th day of April, 1896.

A. D. TOUZALIN,
Notary Public.

[SEAL.]

I approve the foregoing bond as supersedeas.

DAVID J. BREWER,
Associate Justice of the United States Supreme Court.

May 1st, 1896.

(Endorsed:) 7805. The Chicago, Burlington & Quincy Railroad Company *v.* The State of Nebraska *ex rel.* The City of Omaha. Bond. Supreme court of Nebraska. Filed May 7, 1896. D. A. Campbell, clerk.

162 And on the same day, to wit, the 7th day of May, 1896, there was filed in the office of the said clerk the following writ of error:

163 UNITED STATES OF AMERICA, ss:

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the

said State in which a decision could be had in the said suit between The Chicago, Burlington & Quincy Railroad Company, plaintiff in error, and The State of Nebraska *ex rel.* The City of Omaha, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
164 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 1st day of May, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

165 [Endorsed:] 7805. The Chicago, Burlington & Quincy Railroad Company *v.* The State of Nebraska *ex rel.* The City of Omaha. Supreme court of Nebraska. Filed May 7, 1896. D. A. Campbell, clerk.

THE SUPREME COURT OF NEBRASKA, *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled cause, together with all things concerning the same, to wit: The original petition for allowance of writ of error and allowance of same, the original writ of error, original citation, with proof of service; original assignment of errors, and copy of bond. Copies of the writ of error and citation have been lodged and remain in my office.

Seal Supreme Court of Nebraska.

In testimony whereof I hereunto subscribe my name and cause to be affixed the seal of said court this 7th day of May, A. D. 1896.

D. A. CAMPBELL, *Clerk.*

166 And on the same day, to wit, the 7th day of May, 1896, there was filed in said clerk's office the following citation and proof of service of same:

167 UNITED STATES OF AMERICA, *ss:*

To The State of Nebraska *ex rel.* The City of Omaha, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nebraska, wherein The Chicago, Burlington & Quincy Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 1st day of May, in the year of our Lord one thousand eight hundred and ninety-six.

DAVID J. BREWER,

Associate Justice of the Supreme Court of the United States.

168 [Endorsed:] 7805. The Chicago, Burlington & Quincy Railroad Company *v.* The State of Nebraska *ex rel.* The City of Omaha. Citation. Supreme court of Nebraska. Filed May 7, 1896. D. A. Campbell, clerk.

On this sixth day of May, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared James E. Kelby before me, the subscriber, James Hodge, notary public within and for the county of Douglas, State of Nebraska, and makes oath that he delivered a true copy of the within citation to the defendant in error named therein, to wit, The City of Omaha, by delivering the same to W. J. Broatch, mayor, and W. J. Connell, its attorney and attorney for defendant in error.

Sworn to and subscribed the 6th day of May, A. D. 1896.

{ Notarial Seal of J. Hodge, Douglas County, Nebraska. Commission Expires Mar. 8, 1898. }

JAMES HODGE,

Notary Public for Douglas County, Neb.

Rec'd copy 5, 5, '96.

W. J. CONNELL, *City Att'y.*

Rec'd copy 5, 6, '96.

W. J. BROATCH,

Mayor City of Omaha, Neb.

169 And on the same day, to wit, the 7th day of May, 1896, there was filed in said clerk's office the following assignment of errors:

170 In the Supreme Court of the United States, October Term, 1896.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error,
vs.
STATE OF NEBRASKA *ex Rel.* CITY OF OMAHA, Defendant in Error.
} Assignment of Errors.

And now comes the said plaintiff in error and says that in the record and proceedings of the supreme court of the State of Nebraska in the above-entitled cause there is manifest error, in this, to wit:

1. The supreme court of Nebraska erred in making the decree or judgment rendered in this suit and in affirming the erroneous judgment therein of the district court of Douglas county, Nebraska.

2. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7 of chapter 3, Laws of Nebraska, 1893, it impairs the obligation of the contract under which the track of the plaintiff in error across Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereon, was located and constructed, contrary to the Constitution of the United States.

3. The decree or judgment is erroneous in that by adjudg-
171 ing the validity and the enforcement of ordinance No. 3752, passed by the city council of the city of Omaha on January 30, 1894, an authority exercised under the State of Nebraska, it impairs the obligation of the contract under which the track of the plaintiff in error across Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereon, was located and constructed, contrary to the Constitution of the United States.

4. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7 of chapter 3, Laws of Nebraska, 1893, it impairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the Constitution of the United States.

5. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of ordinance No. 3752, passed by the city council of the city of Omaha on January 30, 1894, an authority exercised under the State of Nebraska, it impairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the provision of the Constitution of the United States.

6. The decree or judgment is erroneous in that it deprives the

Chicago, Burlington & Quincy Railroad Company of its property and confers it upon other persons for a private use, contrary to the Constitution of the United States.

7. The decree or judgment is erroneous in that it deprives the Chicago, Burlington & Quincy Railroad Company of its
172 property without making just compensation therefor, contrary to the Constitution of the United States and in abridgement of the privileges and immunities of the Chicago, Burlington & Quincy Railroad Company, thus denying to it the equal protection of the law.

8. The decree or judgment is erroneous in that it deprives the Chicago, Burlington & Quincy Railroad Company of its property without due process of law, contrary to the Constitution of the United States.

And the said Chicago, Burlington & Quincy Railroad Company prays that the judgment aforesaid may be reversed and annulled, and that it may be restored to all things which it hath lost by occasion of the said judgment.

RALPH W. BRECKENRIDGE,
Attorney for Plaintiff in Error, Chicago, Burlington & Quincy Railroad Company.

173 [Endorsed:] 7805. In United States Supreme Court. Chicago, Burlington & Quincy Railroad Company *vs.* State of Nebraska *ex rel.* City of Omaha. Assignment of errors. Supreme court of Nebraska. Filed May 7, 1896. D. A. Campbell, clerk.

174 THE STATE OF NEBRASKA, *ss:*

I, D. A. Campbell, clerk of the supreme court of the State of Nebraska, do hereby certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the case of The Chicago, Burlington and Quincy Railroad Company against The State of Nebraska *ex rel.* The City of Omaha as fully as the same remains on file and of record in my office.

Seal Supreme Court of Nebraska.

In testimony whereof I have hereunto set my hand and caused to be fixed the seal of said court this 7th day of May, A. D. 1896.

D. A. CAMPBELL, *Clerk.*

Endorsed on cover: Case No. 16,300. Nebraska supreme court. Term No., 524. The Chicago, Burlington & Quincy Railroad Company, plaintiff in error, *vs.* The State of Nebraska *ex rel.* The City of Omaha. Filed May 16, 1896.